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No. 8408

United States Circuit Court of Appeals

For the Ninth Circuit.

C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,

Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8408

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

ATTORNEYS OF RECORD.

STEPHEN D. MONAHAN, Esquire,
LaVille de Paris Building
Nogales, Arizona
Attorney for Appellant.

JAMES V. ROBINS, Esquire,
Trust Building,
Nogales, Arizona
Attorney for Appellee. [3*]

In the Superior Court of the State of Arizona, in and for the County of Santa Cruz.

E-234-Tuc.

SANTA CRUZ COUNTY, a body politic and corporate,

Plaintiff,

vs.

W. J. DONALD, as Receiver of The Nogales National Bank, a national banking association,

Defendant.

SUIT TO ESTABLISH AND FORECLOSE A LIEN.

COMPLAINT.

The plaintiff complains and alleges:

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

I.

That plaintiff, Santa Cruz County, is a body politic and corporate within the State of Arizona. That The Nogales National Bank was at all times herein mentioned a national banking association duly created, organized and existing under the laws of the United States and having its place of business at the City of Nogales, Santa Cruz County, Arizona. That said banking association ceased doing business on December 1, 1931, and that said banking association was declared to be insolvent and a Receiver of said banking association was duly appointed by the Comptroller of Currency of the United States on December 16, 1931. That defendant, W. J. Donald, was duly appointed the Receiver of said banking association on February 11, 1932, to take effect at the close of business on February 13, 1932, by F. G. Awalt, acting Comptroller of the Currency [4] of the United States. That thereupon said W. J. Donald took possession of all of the property and assets of said insolvent banking association and since February 13, 1932, has been, and now is the duly appointed, qualified and acting Receiver of said banking association and all of its property and assets.

II.

That said The Nogales National Bank was, prior to June 28, 1928, appointed and designated by the County Treasurer of Santa Cruz County, Arizona, with the consent of the Board of Supervisors of

said County, to be a depository of monies of said County, and that on June 28, 1928, and on April 10, 1931, there was on deposit with said banking association as such depository the sum of Fifty Thousand ($50,000.00) Dollars, monies of said Santa Cruz County deposited by the County Treasurer of said Santa Cruz County. That on June 28, 1928, said banking association delivered to The National City Bank of New York, a banking association or corporation doing business in the City and State of New York, the following described bonds, together with the coupons thereto attached, to-wit:

> Twenty-one (21) City of Nogales Waterworks Improvement bonds issued by the City of Nogales, a municipal corporation in the State of Arizona, for the purpose of acquiring funds to improve the water distribution system of said City; said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twenty-three (23) to forty-three (43), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent. per annum payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each, coupon number fifteen (15), the lowest numbered coupon attached to each of said bonds, being payable

on June 1, 1935, and the highest numbered coupon attached to each of said bonds being payable on the same date as the bond to which the same is attached. [5]

Also, nine (9) City of Nogales Sewage Disposal Bonds issued by said City of Nogales for the purpose of acquiring funds to improve the sewage disposal system of said City, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twelve (12) to twenty (20), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent. per annum, payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each, coupon number fourteen (14), the lowest numbered coupon attached to each of said bonds, being payable on December 1, 1934, and the highest numbered coupon attached to each of said bonds being payable on the same date as the bond to which the same is attached.

That thereafter on April 10, 1931, said The Nogales National Bank delivered to said The National City Bank of New York the following described bonds with the coupons attached thereto, to-wit:

Two (2) certain bonds issued by Salt River Valley Water Users' Association, an Ari-

zona corporation, known as "Stewart Mountain Water Project 5½% Serial Gold Bonds", numbered M473 and M500, dated June 1, 1928, of the denomination of One Thousand ($1,000.00) Dollars each, bearing interest at the rate of five and one-half (5½%) per cent. per annum, payable semi-annually on April 1 and October 1 of each year; together with seven (7) coupons in the sum of Twenty-seven and 50/100 ($27.50) Dollars each attached to each of said bonds, numbered from fifteen (15) to twenty-one (21), both inclusive, coupon number fifteen (15) being payable on October 1, 1935, and coupon number twenty-one (21) being payable on October 1, 1938.

Also, three (3) certain bonds issued by said Salt River Valley Water Users' Association, numbered M1022, M1549 and M1550, dated February 1, 1923, of the denomination of One Thousand ($1,000.00) Dollars each, bearing interest at the rate of six (6%) per cent. per annum, payable semi-annually on February 1 and August 1 of each year, together with the consecutively numbered coupons for the payment of the interest in the sum of Thirty ($30.00) Dollars each, attached to each of said bonds, the lowest numbered coupon attached to each of said bonds being payable on August 1, 1935, and the highest numbered coupon attached to each of said bonds being payable on the same date as the bond to which the same is attached.

III.

That the bonds and coupons hereinabove described in paragraph II of this complaint were so delivered to said The [6] National City Bank of New York for plaintiff, and were pledged by said The Nogales National Bank as security for payment of the public monies and funds of plaintiff so on deposit with said The Nogales National Bank, the condition thereof being that said The Nogales National Bank will promptly pay said public monies to the County Treasurer of Santa Cruz County upon lawful demand therefor, and will, whenever thereunto required by law, pay to said County Treasurer such monies, with interest. That said bank was an inactive depository of said money, and that all of said money was on deposit with said bank for more than six (6) months.

IV.

That on February 26, 1932, the County Treasurer of Santa Cruz County, Arizona, made demand upon the Receiver of said banking association for the payment of said money on deposit and interest, and that the sum of Thirty-eight Thousand, Eight Hundred Forty-six and 85/100 ($38,846.85) Dollars of said deposit, together with interest to June 15, 1935, has been paid; but that the sum of Eleven Thousand, One Hundred Fifty-three and 15/100 ($11,153.15) Dollars of said deposit, with interest thereon from June 15, 1935, at the rate of six (6%) per cent. per annum remains unpaid. That all of said

bonds are in the possession of the County Treasurer of Santa Cruz County.

WHEREFORE, plaintiff prays judgment that it be adjudged and decreed that plaintiff has a lien upon all of said bonds and coupons as security for the unpaid amount of said deposit, to-wit, the sum of Eleven Thousand, One Hundred Fifty-three and 15/100 ($11,153.15) Dollars, with interest thereon from June 15, 1935, at the rate of six (6%) per cent. per annum; that the said pledge of and the lien of plaintiff upon [7] said bonds and coupons, and all thereof, be foreclosed and that said bonds and coupons be sold according to law and the proceeds of sale apply to the payment of said sum of Eleven Thousand, One Hundred Fifty-three and 15/100 ($11,153.15) Dollars, with interest as aforesaid, and the costs and expenses of this suit and such sale; that plaintiff have judgment for its costs and such further relief as plaintiff may be justly entitled.

JAMES V. ROBINS
County Attorney of Santa Cruz County, Arizona,
Trust Building, Nogales, Ariz.
Attorney for Plaintiff.

State of Arizona,
County of Santa Cruz—ss.

JAMES V. ROBINS, being first duly sworn, upon his oath deposes and says:

That he is the attorney for plaintiff in the above entitled action, and that he makes this affidavit for

and on behalf of plaintiff; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein stated are true in substance and in fact.

JAMES V. ROBINS

Subscribed and sworn to before me on this 31st day of December, 1935.

My commission expires September 28, 1938.

[Seal] GRAYCE R. HILER
Notary Public.

[Transcript of record on removal endorsed]: Filed Feb. 3, 1936. [8]

[Title of Court and Cause.]

PETITION OF DEFENDANT, W. J. DONALD, AS RECEIVER OF THE NOGALES NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

To the Honorable, the Superior Court for the State of Arizona, in and for the County of Santa Cruz.

I.

Your petitioner respectfully represents to the Court that he is the duly appointed and acting receiver of the Nogales National Bank of Nogales,

Arizona, an insolvent national banking association; that the Nogales National Bank of Nogales, Arizona, is a national banking association duly organized and existing under the National Banking laws of the United States of America, having its principal place of business in the City of Nogales, County of Santa Cruz, State of Arizona, and has at all times hereinafter mentioned been doing a general banking business in the said city of Nogales until on or about the 30th day of November, 1931, when said bank voluntarily suspended business, and that on or about the 11th day of December, 1931, the Honorable Comptroller of Currency of the United States appointed a receiver therefor, and that your petitioner, W. J. Donald, is now the duly appointed, qualified, and acting receiver of the said Nogales National Bank; *that was,* at the time of the commencement of said suit, and still is, a resident of the State of Arizona; that the amount and matter in [9] dispute in the above entitled cause exceed, exclusive of interest and costs, the sum or value of three thousand ($3000.00) dollars and that the suit is of a civil nature.

Your petitioner further shows unto this court that the said above entitled suit is one of a civil nature arising under the Constitution and the laws of the United States of America, to wit: Judicial Code, section 24, subdivision 16, which is as follows:

"The District Courts shall have jurisdiction as follows: of all cases * * * against any national bank-

ing association, and cases for winding up the affairs of any such bank * * *".

Your petitioner further shows that the controversy herein arises from the following facts: the County Treasurer of Santa Cruz County, Arizona, is in possession, under a purported pledge agreement to guarantee deposit of county funds, of bonds owned by the Nogales National Bank, aforesaid, to the par value of, to wit: Twenty five thousand dollars ($25,000.00) and demands that judgment be given Santa Cruz County against the said W. J. Donald, as receiver of the said Nogales Bank, in the sum of eleven thousand one hundred fifty-three and 15/100 dollars ($11,153.15) with interest thereon from June 15, 1935, and that it be adjudged and decreed that plaintiff has a lien upon all of said bonds and coupons as security for that sum, and that the said bonds be sold and the proceeds applied to the payment of the said sum so claimed.

Your petitioner further represents unto this Court that the case as presented by the complaint herein is one for winding up the affairs of a national banking association within the meaning of the statute above quoted.

Your petitioner offers herewith, good and sufficient surety for its entering in the District Court of the United States for the District of Arizona, within thirty days from the time of filing this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court if said court shall hold that this suit

[10] was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein, except to make the order of removal to said District Court of the United States as required by law, and to accept said surety and bond, and to *ca* cause the record herein to be removed to said District Court of the United States in and for the District of Arizona.

W. J. DONALD
Receiver of the Nogales National Bank, of Nogales, Arizona.

State of Arizona,
County of Santa Cruz—ss.

W. J. Donald, being duly sworn on oath, says that he has read the above and foregoing petition and knows the contents thereof, and that the same is *trueof* his own knowledge, in substance and fact.

W. J. DONALD

Subscribed and sworn to before me, a notary public in and for Santa Cruz County, by W. J. Donald, January 16, 1936.

STEPHEN D. MONAHAN
Notary Public

My commission expires October 2, 1939.

[Transcript of Record on Removal Endorsed]: Filed Feb. 3, 1935. [11]

Know all men by these presents, that we, W. J. Donald, as principal, and Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto the County of Santa Cruz, State of Arizona, in the sum of Five Hundred Dollars ($500.00) to be paid to the said Santa Cruz County; to which payment well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Whereas, the above bounden W. J. Donald has petitioned the Superior Court of the State of Arizona, in and for Santa Cruz County, for a removal of a cause therein pending, wherein Santa Cruz County is plaintiff and W. J. Donald, as Receiver of The Nogales National Bank, an insolvent national banking association is defendant, to the District Court of the United States for the District of Arizona, pursuant to the provisions of the act of Congress in that behalf;

Now, therefore, the condition of the above obligation is such that if the above bounden W. J. Donald, Receiver, shall enter in such District Court within thirty days from the time of filing said petition, a certified copy of the record in such suit, copies of the process against petitioner, and all of the pleadings, depositions, testimony and other proceedings in the cause, and shall pay all costs that may be awarded by said District Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and

there appear, then this obligation shall be null and void, otherwise of force.

W. J. DONALD

[Transcript of Record on Removal Endorsed]: Filed Feb. 3, 1935. [12]

[Title of Court and Cause.]

ORDER.

Upon reading and filing the petition of W. J. Donald, receiver, for removal of above entitled action to the District Court of the United States for the District of Arizona, and the bond thereto attached, showing that all the proceedings for the removal of said above entitled action into the District Court of the United States for the District of Arizona, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Stephen D. Monahan, Attorney for the petitioner,

It is hereby ordered, that said petition and bond be and they are hereby accepted, that said Superior Court of the State of Arizona in and for the County of Santa Cruz proceed no further in said suit, that said suit be, and the same is hereby removed into the District Court of the United States for the District of Arizona, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the District Court of the United States for the

District of Arizona, at Tucson, Arizona, copies of the record and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause.

Dated this 24th day of January, 1936. Done in open Court.

E. R. THURMAN
Judge of said Superior Court.

[Transcript of Record on Removal Endorsed]: Filed Feb. 3, 1935. [13]

In the District Court of the United States in and for the District of Arizona.

E-234 Tucson.

SANTA CRUZ COUNTY, a body politic and corporate,

Plaintiff.

vs.

W. J. DONALD, as Receiver of the Nogales National Bank, a national banking association,

Defendant.

NOTICE.

To James V. *Robbins,* Attorney for Plaintiff:

You are hereby notified that on January 24th, 1936, by an order of the Superior Court of the State of Arizona, in and for Santa Cruz County, the above entitled cause was duly removed from

said Court to the District Court of the United States, for the District of Arizona and a transcript of the record of said cause was filed in the office of the Clerk of said District Court at Tucson, Arizona, on the 3rd day of February, 1936.

STEPHEN D. MONAHAN
Attorney for Defendant

Received a copy of the above notice this 6th day of February, 1936.

JAMES V. ROBINS
Atty. for Plaintiff G. R. H.

[Endorsed]: Filed Feb. 12, 1936. [14]

[Title of Court and Cause.]

ANSWER AND COUNTERCLAIM.

The defendant, W. J. Donald, as receiver of the Nogales National Bank of Nogales, Arizona, an insolvent National Banking Association, for answer to plaintiff's complaint, filed herein, admits, denies and alleges as follows:

I.

Admits the allegations in paragraph I of said complaint.

II.

Alleges that he is not informed as to any appointment or designation of the Nogales National Bank as a depository of county funds, or the deposit of county funds therein except and unless as follows:

That heretofore, on to-wit: January 3, 1925, the said Anna B. Ackley, as treasurer aforesaid, deposited in the Nogales National Bank the sum of Thirty Thousand Seven Hundred Two and 67/100 ($30,702.67) dollars and that various and sundry amounts were so deposited from time to time by her until on or about May 7, 1928, that the total of said sums so deposited was the sum of Fifty Thousand ($50,000.00) dollars; that on January 2, 1929, the said sum was transferred on the books of said bank to the account of A. Dumbauld, as treasurer of Santa Cruz County; that since June 1st, 1928, no deposits of money or credits of any kind have been made in the said account; that the said account stood in the name of A. Dumbauld, as treasurer aforesaid, at the time [15] of the closing of the said bank and appointment of a receiver therefore; that since, to-wit: January 2, 1933, the account has stood on the books of the said bank and now so stands in the name of Anna B. Ackley, as treasurer of Santa Cruz County, aforesaid. Defendant admits the other allegations in paragraph II of said complaint.

III.

Admits that the bonds described in paragraph II of said complaint were delivered to the National City Bank of New York, and admits that the funds described in paragraph II of this answer were on deposit with the said Nogales National Bank more than six months. Defendant denies all other allegations in paragraph III of said complaint.

IV.

Answering the allegations of paragraph IV of said complaint, defendant alleges that he is informed and believes that the said bonds are in the possession of Anna B. Ackley, Treasurer of Santa Cruz County. Defendant denies all other allegations in paragraph IV of said complaint.

V.

As and For a Separate Defense and by Way of Counterclaim This Defendant Alleges:

That this answer is filed by direction of the Honorable Comptroller of the United States Currency, that the amount involved exclusive of interest and costs exceeds the sum of Three Thousand ($3,000.00) dollars; that the action is one for winding up the affairs of a national banking association; that the action is one brought under the laws of the United States and involves the construction of a United States statute:

VI.

That Anna B. Ackley, was during the years 1925, 1926, 1927 and 1928, the duly elected, qualified and acting Treasurer of Santa Cruz County, a duly organized and constituted political subdivision of the State of Arizona; that during the years 1929, 1930, 1931 and 1932, A. Dumbauld was the duly elected, qualified and acting Treasurer of the *safore*said county, and that during the years 1933, 1934, 1935 was and now is [16] the duly elected, qualified and acting treasurer of said County; that

Anna B. Ackley is a resident of the County of Santa Cruz and State of Arizona; that A. Dumbauld is a resident of the County of Maricopa and State of Arizona.

VII.

That heretofore, on to-wit: January 3, 1925, the said Anna B. Ackley, as treasurer aforesaid, deposited in the Nogales National Bank the sum of Thirty Thousand Seven Hundred Two and 67/100 ($30,702.67) dollars and that various and sundry amounts were so deposited from time to time by her until on or about May 7, 1928, that the total of said sums so deposited was the sum of Fifty Thousand ($50,000.00) dollars; that on January 2, 1929, the said sum was transferred on the books of said bank to the account of A. Dumbauld, as treasurer of Santa Cruz County; that since June 1st, 1928, no deposits of money or credits of any kind have been made in the said account; that the said account stood in the name of A. Dumbauld, as treasurer aforesaid, at the time of the closing of the said bank and the appointment of a receiver therefore; that since, to-wit: January 2, 1933, the account has stood on the books of the said bank and now so stands in the name of Anna B. Ackley, as treasurer of Santa Cruz County, aforesaid.

VIII.

That on March 14, 1928, the said Nogales National Bank delivered to the National City Bank of New York City, a national banking association or cor-

poration, fifteen certain bonds of Pima County School District No. 1, to the par value of Fifteen Thousand ($15,000.00) dollars, and five certain bonds of the Salt River Valley Water Users Association, to the par value of Five Thousand ($5,000.00) dollars and from the said National City Bank of New York City, received an escrow receipt which is in words and figures as follows: [17]

"ESCROW RECEIPT.

We hereby acknowledge receipt from the Nogales National Bank of Nogales, Arizona, of the following securities:

$15,000. County of Pima School District No. 1 School Bldg. Bond 5% due March 1, 1939 with September 1928 and subsequent coupons attached, Nos. 17/31, interest payable March and September 1.

5,000. Salt River Valley Water Users Association, Arizona. 6% Funding Serial Gold Bonds 6% due July 1, 1931 with July *928* and subsequent coupons attached, Nos. 904/8, interest payable January and July 1.

to be held in escrow upon the following terms and conditions:

1. To surrender all or any part of said securities at any time to said Nogales National Bank, at its request, upon receipt of a statement in writ-

ing signed by the then Treasurer of Santa Cruz County, Arizona, acknowledging that said County of Santa Cruz, Arizona, has no interest in the securities so surrendered.

2. To collect the interest coupons maturing on said securities so long as same remain in our possession hereunder, and to pay over the proceeds thereof to said Nogales National Bank.

3. To deliver any and all of such securities remaining in our possession hereunder at any time after the 14th day of March, 1928, to the then Treasurer of the County of Santa Cruz, Arizona, upon his written demand therefor, to be held by said Treasurer for the benefit of said County of Santa Cruz, Arizona, and of said Nogales National Bank as their respective interests may appear, but without any responsibility on our part from any disposition thereof which may be made by him.

4. We may at any time act in reliance upon the signature of any person purporting to act as Treasurer of the County of Santa Cruz, Arizona, without liability of any kind therefor, either to said County of Santa Cruz, Arizona, or to said Nogales National Bank, or to any other claimant, but we shall not be required to do so, and may in our discretion at any time require such evidence of the signature and authority of such Treasurer as may be satisfactory to our attorneys.

5. We are not to be required to keep any of said securities insured against any risks whatever, nor are we to be responsible for the safekeeping of

said securities except to give to them the same care as we do our own property.

6. The Nogales National Bank is to pay any and all expenses which we may incur, and to indemnify and save us harmless against any and all loss and damages which we may suffer or sustain hereunder or in connection herewith.

7. We may act in reliance upon advice of counsel in reference to any matters in connection with this escrow, and shall not be liable for any mistake of fact or error of judgment, or for any acts of omissions of any kind, unless caused by our own misconduct.

Executed in duplicate, this 14th day of March, 1928.

THE NATIONAL CITY BANK
OF NEW YORK
By E. C. BOGERT
A. Cashier. [18]

IX.

That on June 28, 1928, the said Nogales National Bank delivered to the said National City Bank of New York City, twenty one certain City of Nogales Water Works improvement bonds to the par value of Twenty One Thousand ($21,000.00) dollars and nine certain City of Nogales Sewage Disposal Bonds to the par value of Nine Thousand ($9,000.00) dollars and received from the said Na-

tional City Bank its escrow receipt which is in words and figures as follows:

"ESCROW RECEIPT.

We hereby acknowledge receipt from Nogales National Bank, Nogales, Arizona, of the following securities:

$21,000. City of Nogales, Water Works Improvement Bond 4½% Due December 1, 1953 with December 1, 1928 and subsequent coupons attached Nos. 23/43 for $1,000 each

$9,000. City of Nogales, Sewage Disposal Bond 4½% Due December 1, 1951 with December 1 1928 and subsequent coupons attached Nos. 12/20 for $1,000 each.

to be held in escrow upon the following terms and conditions.

1. To surrender all or any part of said securities at any time to said Nogales National Bank, Nogales, Arizona, at its requests, upon receipt of a statement in writing signed by the then Treasurer of Santa Cruz County, Arizona, acknowledging that said Santa Cruz County, Arizona, has no interest in the securities so surrendered.

2. To collect the interest coupons maturing on said securities so long as same remain in our possession hereunder, and to pay over the proceeds thereof to said Nogales National Bank, Nogales, Arizona.

3. To deliver any and all of such securities remaining in our possession hereunder at any time

after the 29th of June, 1928, to the then Treasurer of Santa Cruz County, Arizona, upon his written demand therefor, to be held by said Treasurer for the benefit of said Santa Cruz County, Arizona, and of said Nogales National Bank, as their respective interests may appear, but without any responsibility on our part for any disposition thereof which may be made by him.

4. We may at any time act in reliance upon the signature of any person purporting to act as Treasurer of Santa Cruz County, Arizona, without liability of any kind therefor, either to said Santa Cruz County, Arizona or to said Nogales National Bank, or to any other claimant, but we shall not be required to do so, and may in our discretion at any time require such evidence of the signature and authority of such Treasurer as may be satisfactory to our attorneys.

5. We are not to be required to keep any of said securities insured against any risks whatever, nor are we to be responsible for the safekeeping of said securities except to give to them the same care as we do our own property.

6. Nogales National Bank, Nogales, Arizona, is to pay any and all expenses which we may incur, and to indemnify and save us harmless against any and all loss and damages which we may suffer or sustain hereunder or in connection herewith.

[19]

7. We may act in reliance upon advice of counsel in reference to any matters in connection with

this escrow, and shall not be liable for any mistake of fact or error of judgment, or for any acts or omissions of any kind, unless caused by our own wilful misconduct.

Executed in duplicate, this 28th day of June, 1928.

THE NATIONAL CITY BANK
OF NEW YORK
By H. D. HALL
A. Cashier

X.

That subsequent thereto, at a time the exact date of which this defendant is not informed, the then County Treasurer of said County, received from the National City Bank of New York City, all of the bonds so held by it and heretofore described. That thereafter, during the month of February, 1931, the then County Treasurer, A. Dumbauld, surrendered to the Nogales National Bank, five Salt River Valley Water Users Association bonds to the par value of Five Thousand ($5,000.00) dollars and more fully described in the aforesaid escrow receipt of March 14, 1928, and that no other bonds nor the proceeds of any other of said bonds heretofore described have been received by the Nogales National Bank aforesaid or any receiver thereof.

XI.

Upon information and belief that on December 27th, 1932, A. Dumbauld, the then County Treas-

urer aforesaid, sold fifteen certain Pima County school bonds of the par value of Fifteen Thousand ($15,000.00) dollars and more fully described in the said escrow receipt of March 14, 1928, for the sum of Fourteen Thousand Two Hundred Fifty Seven and 16/100 ($14,257.16) dollars, which said bonds were the property of the said Nogales National Bank and that the proceeds of said bonds were retained by the then acting County Treasurer A. Dumbauld and now are in the possession of the present acting treasurer, Anna B. Ackley that the balance of said bonds, heretofore described are in the possession of the said Anna B. Ackley.

XII.

That on to-wit: January 21, 1936, the defendant, as receiver aforesaid, made demand for the return of said bonds or the proceeds thereof, [20] on Anna B. Ackley and on A. Dumbauld each, by depositing in the United States Post Office, registry division, an envelope bearing the required United States postage, addressed to A. Dumbauld at his address in Phoenix, Arizona, and a similar envelope addressed to Anna B. Ackley at Nogales, Arizona, and each envelope containing the following demand:

"TO
Anna B. Ackley,
Treasurer of Santa Cruz County,
State of Arizona
and
A. Dumbauld,
Ex treasurer of Santa Cruz County,
State of Arizona

I hereby demand that you deliver up and return to me as the duly appointed, qualified and acting receiver of the Nogales National Bank, an insolvent national banking association, the following described bonds held by you in violation of the National Banking laws of the United States of America:

Twenty One Thousand ($21,000.00) dollars City of Nogales, water works improvement bonds, 4½% due December 1, 1953 with December 1, 1928 and subsequent coupons attached, Nos. 23/43 for One Thousand ($1,000.00) dollars each, or the proceeds thereof if disposed of and any interest collected by you, or either of you.

Nine Thousand ($9,000.00) dollars City of Nogales sewage disposal bonds 4½% due December 1, 1951, with December 1, 1928 and subsequent coupons attached Nos. 12/20 for One Thousand ($1,000.00) dollars each, or the proceeds thereof if disposed of and any interest collected by you, or either of you.

Fifteen Thousand ($15,000.00) dollars County of Pima School District No. 1 School Bldg. bonds

5% due March 1, 1939 with September 1928 and subsequent coupons attached, Nos. 17/31 interest payable March and September, One Thousand ($1,000.00) dollars each, or the proceeds thereof if disposed of and any interest collected by you, or either of you.

The above described bonds were and are the property of the Nogales National Bank, of Nogales, Arizona, now insolvent.

Dated January 16th, 1936.

W. J. DONALD

Receiver of the Nogales National Bank, of Nogales, Arizona, an insolvent national banking association." [21]

XIII.

That the said A. Dumbauld and Anna B. Ackley and each of them have failed and refused to deliver to this defendant any of the said bonds or the proceeds.

That the said bonds or the proceeds thereof, if sold or otherwise disposed of, are the property of the Nogales National Bank, aforesaid, that the said A. Dumbauld, Anna B. Ackley and the County of Santa Cruz, nor either or any of them, have any right, title or interest in or to the said bonds nor to the proceeds thereof: that the delivery of said bonds by the Nogales National Bank to the said National City Bank of New York City as a pledge or otherwise, was illegal and ultra vires.

XIV.

Defendant alleges that there are persons, to-wit: A. Dumbauld and Anna B. Ackley, who are not parties to this action and who have an interest in the controversy and who are necessary parties to a complete determination of the controversy involved in this action. That the said A. Dumbauld and Anna B. Ackley or either of them have received or hold said bonds or the proceeds thereof and that any decree of this court directing the return of said bonds or the proceeds thereof to this defendant must be to either or both said A. Dumbauld and Anna B. Ackley; that without their presence in this action there is no party over whom the court would have jurisdiction to compel the delivery of said bonds or the proceeds thereof to this defendant.

Wherefore defendant prays that the said A. Dumbauld and the said Anna B. Ackley, as treasurer of Santa Cruz County, be made additional parties to this action, and that process be directed to issue to them in pursuance to the rules of this court and the statutes in such case made and provided.

And that the said Anna B. Ackley be enjoined and restrained from selling or otherwise disposing of said bonds or the proceeds thereof if already sold, pending the final determination of this action.

And that the defendant have the judgment of this Honorable Court that a decree be entered directing and commanding the said A. Dumbauld and Anna B. Ackley and each or either of them to deliver to this [22] defendant, as receiver of the

Nogales National Bank, all of the said bonds above described, and in the event that any of said bonds have been sold, to deliver up to this defendant the proceeds thereof, together with an accounting for the same, and for such other and further relief in the premises as to this court shall seem meet and proper.

STEPHEN D. MONAHAN
Attorney for Defendant
W. J. Donald, Receiver

State of Arizona,
County of Santa Cruz—ss.

W. J. DONALD, being first duly sworn, deposes and says that he, as receiver of the Nogales National Bank, an insolvent national banking association, is the defendant in the above entitled cause; that he has read the complaint of Santa Cruz County, plaintiff, filed herein and knows the contents thereof. That he has read the above and foregoing answer and knows the contents thereof; that the matters and things therein denied are untrue in fact and substance of his own knowledge except as to the matters therein denied on information and belief, and as to them he believes them to be untrue in fact and substance; that the matters and things therein alleged are true in substance and fact to his own knowledge, except such matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

W. J. DONALD

Subscribed and sworn to before me this 5th day of February, 1936.

[Seal] STEPHEN D. MONAHAN
Notary Public.

My Commission expires October 2, 1939. [23]

[Endorsed]: Filed Feb. 12, 1936. [24]

[Title of Court.]

November 1935 Term At Tucson

Minute Entry of
Thursday, February 27, 1923
(Tucson Equity Minutes.)

HONORABLE ALBERT M. SAMES, Judge
United States District Court, Presiding.

[Title of Cause.]

On motion of Stephen D. Monahan, Esquire, counsel for the defendant, and upon reading said defendant's answer and counterclaim heretofore filed herein,

IT IS ORDERED that Anna B. Ackley, as Treasurer of Santa Cruz County, Arizona, and A. Dumbauld, be made additional parties defendant herein.

Whereupon, the following Order is entered. [25]

[Title of Court and Cause.]

ORDER.

It is hereby ordered that Anna B. Ackley, as treasurer of Santa Cruz County, Arizona, and A. Dumbauld be made additional parties, defendant to this action, and that the subpoena of this court issue directed to each of them summoning and directing them and each of them to appear and answer the counterclaim, filed herein, within twenty (20) days from the date of said service upon them.

Done in open court this 27th day of February, 1936.

ALBERT M. SAMES
Judge of District Court.

[Endorsed]: Filed Feb. 27, 1936. [26]

[Title of Court and Cause.]

ANSWER OF DEFENDANT, ANNA B. ACKLEY, AS COUNTY TREASURER OF SANTA CRUZ COUNTY, ARIZONA.

Comes now the defendant, Anna B. Ackley, as County Treasurer of Santa Cruz County, Arizona, by her solicitor, James V. Robins, and in answer to the matters and things stated in plaintiff's complaint in this action, said defendant admits all of the allegations in said complaint contained.

WHEREFORE, said defendant prays that she have judgment for her costs against the defendant,

W. J. Donald, as Receiver of The Nogales National Bank, a national banking association.

JAMES V. ROBINS
Trust Building, Nogales, Arizona,
Solicitor for Defendant,
Anna B. Ackley, as County Treasurer of Santa Cruz County, Arizona.

[Endorsed]: Filed Mar. 27, 1936. [27]

[Title of Court and Cause.]

ANSWER OF DEFENDANT, A. DUMBAULD.

Comes now the defendant, A. Dumbauld, by his solicitor, James V. Robins, and in answer to the matters and things stated in plaintiff's complaint in this action, said defendant admits all of the allegations in said complaint contained.

WHEREFORE, said defendant prays that he have judgment for his costs against the defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association.

JAMES V. ROBINS
Trust Building, Nogales, Arizona,
Solicitor for Defendant,
A. Dumbauld.

[Endorsed]: Filed Mar. 27, 1936. [28]

[Title of Court and Cause]

ANSWER OF SANTA CRUZ COUNTY TO SEPARATE DEFENSE AND COUNTERCLAIM OR W. J. DONALD, AS RECEIVER OF THE NOGALES NATIONAL BANK, A NATIONAL BANKING ASSOCIATION.

Comes now the plaintiff, Santa Cruz County, a body politic and corporate, and in answer to the separate defense and counterclaim of the defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national Banking association, plaintiff admits, denies and alleges as follows, to-wit:

I.

Admits the allegations of paragraphs VI and VII of said separate defense and counterclaim. Admits the allegations of paragraphs VIII, IX and X of said separate defense and counterclaim, but alleges that the bonds described in said paragraphs were so delivered to said The National City Bank of New York for plaintiff, and were pledged by said The Nogales National Bank as security for payment of public monies and funds of plaintiff so on deposit with said The Nogales National Bank, the condition thereof being that said The Nogales National Bank will promptly [29] pay said public monies to the County Treasurer of Santa Cruz County, upon lawful demand therefor, and will whenever thereunto required by law pay to said County Treasurer such monies with interest. That

said bank was an inactive depository of said money, and that all of said money was on deposit with said bank for more than six (6) months. Plaintiff further alleges that on February 26, 1932, the County Treasurer of said Santa Cruz County made demand upon the defendant receiver of said banking association for the payment of said money on deposit and interest, and that the sum of Thirty-eight Thousand Eight Hundred Forty-six and 85/100 ($38,846.85) Dollars of said deposit, together with interest to June 15, 1935, has been paid; but that the sum of Eleven Thousand One Hundred Fifty-three and 15/100 ($11,153.15) Dollars of said deposit, with interest thereon from June 15, 1935, at the rate of six (6%) per cent. per annum remains unpaid. That said bonds are in the possession of said County Treasurer of Santa Cruz County, subject to the terms and conditions of said pledge.

II.

Answering paragraph XI of said separate defense and counterclaim, plaintiff admits that the County Treasurer of said Santa Cruz County sold the bonds described in said paragraph for the sum of Fourteen Thousand Two Hundred Fifty-seven and 16/100 ($14,257.16) Dollars as alleged in said paragraph; admits that said bonds were the property of said The Nogales National Bank, subject, however, to the terms and conditions of said pledge. Admits that the proceeds of said bonds were retained by the then County Treasurer, but denies that such

proceeds are in the possession of the present County Treasurer of said County; admits that the balance of said bonds described in said separate defense and counterclaim are in the possession of said Anna B. Ackley, the County Treasurer [30] of said County, subject, however, to the terms and conditions of said pledge.

III.

Admits the allegations of paragraph XII of said separate defense and counterclaim.

IV.

Admits that said A. Dumbauld and Anna B. Ackley, and each of them, have failed and refused to deliver to said defendant any of said bonds, or the proceeds thereof, but alleges that no demand therefor was ever made by said defendant, except as alleged in paragraph XII of said separate defense and counterclaim.

V.

Denies the allegations of paragraph XIV of said separate defense and counterclaim, but alleges that said bonds are in the possession of said Anna B. Ackley, as County Treasurer of plaintiff, and that said Anna B. Ackley, as County Treasurer, is holding said bonds subject to the terms and conditions of said pledge, as set forth and described in plaintiff's complaint in this action.

WHEREFORE, plaintiff prays that defendant take nothing by its separate defense and counter-

claim, and that plaintiff have judgment against said defendant for its costs.

JAMES V. ROBINS
Trust Building,
Nogales, Arizona,
Solicitor for Plaintiff.

State of Arizona,
County of Santa Cruz—ss.

JAMES V. ROBINS, being first duly sworn, upon his oath deposes and says:

That he is the solicitor for the plaintiff in the above entitled action, and that he makes this affidavit for and on behalf of the plaintiff, for the reason that he is better informed than the plaintiff of the matters and things stated in the foregoing answer. That he has read the foregoing [31] answer and knows the contents thereof; that the matters and things therein alleged are true, and that the matters and things stated in the separate defense and counterclaim of the defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association, and which are denied in the foregoing answer are untrue.

JAMES V. ROBINS

Subscribed and sworn to before me on this 23rd day of March, 1936.

My commission expires: September 28, 1938.
[Seal] GRAYCE R. HILER
Notary Public

[Endorsed]: Filed Mar. 27, 1936. [32]

[Title of Court and Cause.]

ANSWER OF DEFENDANT, ANNA B. ACKLEY, AS COUNTY TREASURER OF SANTA CRUZ COUNTY, ARIZONA, TO SEPARATE DEFENSE AND COUNTERCLAIM OF DEFENDANT, W. J. DONALD, AS RECEIVER OF THE NOGALES NATIONAL BANK, A NATIONAL BANKING ASSOCIATION.

Comes now the defendant, Anna B. Ackley, as County Treasurer of Santa Cruz County, Arizona, and in answer to the separate defense and counterclaim of defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association, said defendant admits, denies and alleges as follows, to-wit:

I.

Admits the allegations of paragraphs VI and VII of said separate defense and counterclaim.

II.

Admits the allegations of paragraphs VIII, IX and X of said separate defense and counterclaim, but alleges that the bonds described in said paragraphs were delivered to said The National City Bank of New York for plaintiff, and were pledged by said The Nogales National Bank as security for payment of the public monies and funds of plaintiff so on deposit with said The [33] Nogales National Bank, the condition of said pledge being that said The Nogales National Bank will promptly

pay said public monies to the County Treasurer of Santa Cruz County upon lawful demand therefor, and will, whenever thereunto required by law, pay to said County Treasurer such monies with interest. That said bank was an inactive depository of said money, and that all of said money was on deposit with said bank for more than six (6) months.

III.

Answering the allegations of paragraph XI of said separate defense and counterclaim, this defendant admits that the County Treasurer of said County sold the bonds described in said paragraph XI for the sum stated in said paragraph XI; admits that said bonds were the property of said The Nogales National Bank, subject, however, to the terms and conditions in said pledge; admits that the proceeds of said bonds were retained by one A. Dumbauld, as County Treasurer of said County, but denies that such proceeds are in the possession of this defendant. Admits that the balance of the bonds described in said separate defense and counterclaim are in the possession of this defendant, as such County Treasurer.

IV.

Admits the allegations of paragraph XII of said separate defense and counterclaim.

V.

Admits that said A. Dumbauld and this defendant have failed and refused to deliver to said de-

fendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association, any of said bonds, or the proceeds thereof, but alleges that [34] no demand therefor was ever made by said defendant receiver, except as alleged in paragraph XII of said separate defense and counterclaim.

V.

Denies the allegations of paragraph XIV of said separate defense and counterclaim, but alleges that said bonds are in the possession of this defendant as such County Treasurer of plaintiff, and that this defendant as such County Treasurer is holding said bonds subject to the terms and conditions of said pledge, as set forth and described in plaintiff's complaint in this action.

WHEREFORE, this defendant prays that defendant receiver take nothing by its separate defense and counterclaim, and that this defendant have judgment against said defendant receiver for her costs.

JAMES V. ROBINS
Trust Building, Nogales, Arizona,
Solicitor for Defendant,
Anna B. Ackley, as County Treasurer
of Santa Cruz County.

State of Arizona,
County of Santa Cruz—ss.

JAMES V. ROBINS, being first duly sworn, upon his oath deposes and says:

That he is the solicitor for the defendant, Anna B. Ackley, as County Treasurer of Santa Cruz

County, Arizona, and that he makes this affidavit for and on behalf of said defendant, for the reason that he is better informed than said defendant of the matters and things stated in the foregoing answer. That he has read the foregoing answer and knows the contents thereof; that the matters and things therein alleged are true, and that the matters and things stated in the separate defense and counterclaim of the defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national Banking association, and which are denied in the foregoing answer are untrue.

JAMES V. ROBINS

Subscribed and sworn to before me on this 23rd day of March, 1936.

[Seal] GRAYCE H. HILER
Notary Public

My commission expires: September 28, 1938.

[Endorsed]: Filed Mar. 27, 1936. [35]

[Title of Court.]

November 1935 Term At Tucson

(Minute Entry of Monday, April 13, 1936)
(Tucson Equity Minutes)

Honorable ALBERT M. SAMES, Judge, United States District Court, Presiding.

[Title of Cause.]

HEARING ON MOTIONS

Motion of the Defendant, A. Dumbauld, to Dismiss Separate Defense and Counterclaim of De-

fendant, W. J. Donald, as Receiver of The Nogales National Bank, and Motion of the Defendant, W. J. Donald, as Receiver of The Nogales National Bank, to Strike Answers of the Defendants A. Dumbauld and Anna B. Ackley, as Treasurer of Santa Cruz County, Arizona, come on regularly for hearing this day.

James V. Robins, Esquire, appears as counsel for the plaintiff and for the defendants A. Dumbauld and Anna B. Ackley, as Treasurer of Santa Cruz County, Arizona. Stephen D. Monahan, Esquire, appears as counsel for the defendant W. J. Donald, as Receiver of The Nogales National Bank.

Argument is now had by respective counsel, and

IT IS ORDERED that said Motion to Dismiss Separate Defense and Counterclaim and said Motion to Strike Answers be submitted and by the Court taken under advisement. [36]

[Title of Court.]

May 1936 Term At Tucson

Minute Entry of Tuesday, May 12, 1936.
(Tucson Equity Minutes)

Honorable ALBERT M. SAMES, Judge United States District Court, Presiding.

[Title of Cause.]

ORDER DENYING MOTIONS.

Motion of the Defendant, A. Dumbauld, to Dismiss Separate Defense and Counterclaim of De-

will, whenever thereunto required by law, pay to said County Treasurer such monies with interest. That said bank was an inactive depository of said money, and that all of said money was on deposit with said bank for more than six (6) months.

III.

Answering the allegations of paragraph XI of said separate defense and counterclaim, this defendant admits that the County Treasurer of said County sold the bonds described in said paragraph XI for the sum stated in said paragraph XI; admits that said bonds were the property of said The Nogales National Bank, subject, however, to the terms and conditions in said pledge; admits that the proceeds of said bonds were retained by this defendant as County Treasurer of said County, but denies that such proceeds are in the possession of Anna B. Ackley. Admits that the balance of the bonds described in said separate defense and counterclaim are in the possession of Anna B. Ackley, as County Treasurer of said County.

IV.

Admits the allegations of paragraph XII of said separate defense and counterclaim.

V.

Admits that this defendant and said Anna B. Ackley as such County Treasurer have failed and refused to deliver to said defendant, W. J. Donald, as Receiver of The Nogales National Bank, a na-

tional banking association, any of said bonds, or the proceeds thereof, but alleges that no demand therefor was ever made by said defendant receiver, except as alleged in paragraph XII of said separate defense and counterclaim. [39]

VI.

Denies the allegations of paragraph XIV of said separate defense and counterclaim, but alleges that said bonds are in the possession of defendant, Anna B. Ackley, as County Treasurer of plaintiff, and that said County Treasurer is holding said bonds subject to the terms and conditions of said pledge as set forth and described in plaintiff's complaint in this action.

WHEREFORE, this defendant prays that defendant receiver take nothing by its separate defense and counterclaim, and that this defendant have judgment against said defendant receiver for his costs.

JAMES V. ROBINS,
Trust Building, Nogales, Arizona, Solicitor for Defendant, A. Dumbauld.

State of Arizona
County of Santa Cruz—ss.

JAMES V. ROBINS, being first duly sworn, upon his oath deposes and says:

That he is the solicitor for the defendant, A. Dumbauld, and that he makes this affidavit for and on behalf of said defendant, for the reason that

he is better informed than said defendant of the matters and things stated in the foregoing answer. That he has read the foregoing answer and knows the contents thereof; that the matters and things therein alleged are true and that the matters and things stated in the separate defense and counterclaim of the defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association, and which are denied in the foregoing answer are untrue.

JAMES V. ROBINS.

Subscribed and sworn to before me on this 25th day of May, 1936.

[Seal] GRAYCE R. HILER
Notary Public. My commission expires: September 28, 1938.

[Endorsed]: Filed May 26, 1936. [40]

[Title of Court.]

May 1936 Term At Tucson

Minute Entry of Tuesday, May 26, 1936.

Honorable ALBERT M. SAMES, Judge United States District Court, Presiding.

[Title of Cause.]

TRIAL SETTING.

Upon stipulation of the respective counsel, heretofore filed herein,

IT IS ORDERED that this case be and the same is hereby set for trial Tuesday, June 16, 1936, at the hour of ten o'clock A. M. [41]

[Title of Court.]

May 1936 Term At Tucson

(Minute Entry of Tuesday, June 16, 1936.)
Tucson Equity Minutes)

Honorable ALBERT M. SAMES, Judge, United States District Court, Presiding.

[Title of Cause.]

PROCEEDINGS OF TRIAL.

This case comes on regularly for trial this day before the Court sitting without a Jury.

James D. Robins, Esquire, appears as counsel for the Plaintiff and for the Defendants, Anna B. Ackley, as Treasurer of Santa Cruz County, Arizona, and A. Dumbauld, Stephen D. Monahan, Esquire, appears as counsel for the Defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association.

Both sides announce ready for trial and now submit and file an agreed Statement of Facts herein.

Upon stipulation of the respective counsel,

IT IS ORDERED that said counsel be permitted to amend said Agreed Statement of Facts by interlineation.

Argument is now duly had by respective counsel, and

IT IS ORDERED that this case be submitted and by the Court taken under advisement. [42]

[Title of Court and Cause.]

MEMORANDUM DECISION.

The facts in this case are not in dispute. In 1928, The Nogales National Bank was designated as depository for public moneys of the county of Santa Cruz and sums amounting on June 1st, 1928, to $50,000.00 were deposited in said bank subject at all times to check or draft, but which have not since been withdrawn, and no deposits or credits have since been made on said account. On March 14, 1928, pursuant to the provision of Sec. 2634, Revised Statutes of Arizona, the Nogales National Bank delivered to National City Bank of New York sixteen Pima County School District bonds and five Salt River Valley Water Users' Association Bonds, and on July 28, 1928, said Nogales Bank delivered to said New York bank certain bonds of the City of Nogales, to wit: twenty-one Water Works Improvement bonds and nine Sewage Disposal bonds, and on Delivery of said bonds said National City Bank of New York issued its receipt stating that said bonds are held in escrow to surrender the same to said Nogales National Bank upon receipt of a written statement of the Treasurer of said County that said county has no interest in said bonds, * * * to deliver said bonds to said County Treasurer on a written demand therefor to be held by said Treasurer of said County and said Nogales bank as their interest may appear. On April 10, 1931, said five Salt River Valley Water

Users' Association Bonds were returned by the New York bank to the Nogales bank, and on the same day seven other bonds issued by said Water Users' Association were delivered by [43] the Nogales bank to said New York bank and a receipt therefor was issued by the latter containing recitals for surrender or delivery as set forth in the receipts issued for said bonds delivered prior thereto. On December 1, 1931, the Nogales National Bank closed. On April 4, 1932, the National City Bank of New York delivered all of said bonds remaining in its possession to the Treasurer of said county. On December 25, 1932, said Treasurer sold the Pima County School District Bonds for $14,257.16, and on October 1, 1933, surrendered two of said Water Users' Association Bonds, last delivered, to the New York bank, to said Water Users' Association on payment by said Association to the Treasurer of $2,000.00. On January 21, 1936, the receiver of the Nogales National Bank made demand on the County Treasurer of said county for the return of said bonds or the proceeds thereof, which was refused. The present County Treasurer acknowledges that he has on hand said bonds or the proceeds thereof.

On June 25, 1930, the National Bank Act, Title 12, U. S. C. A. 90, was amended by the addition of the following:

> "Any association may, upon the deposit with it of public money of a state, or any political subdivision thereof, give security, for the safe

keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

The statute of Arizona, 2634 R. S. A., 1928, authorizes banks to pledge their securities for deposits of public money and no question is raised as to the adequacy of such law for authority to secure such deposits as specified in Title 12, U. S. C. A., Sec. 90, or as to the character of the bonds pledged. The statute specifies that the condition on deposit of securities in lieu of bonds in Arizona banks shall be that such depository will promptly pay to the parties public moneys in its hands upon lawful demand therefor, and will, whenever thereunto required by law, pay to the Treasurer making the deposit, such moneys with interest thereon as provided by law. [44]

It appears from the agreed statement of facts that all of the bonds aforesaid were delivered by said Nogales National Bank to said National City Bank of New York as security for the payment of the deposits of said county in said bank. That the facts evidence a pledge, see R. S. A., 1928, Sec. 2634, Fidelity & Deposit Co. of Maryland et al. v. Kokrda, 66 F. (2d) 641; Kavanaugh v. Fash, 74 F. (2) 435.

The receiver does not question the validity of the delivery as a pledge of the Salt River Valley

Water Users' Association bonds on April 10, 1931, to secure the deposit of the county in said Nogales Bank. He does, however, contend that the delivery and pledge of the bonds of the Nogales National Bank prior to June 25, 1930, was ultra vires and illegal, and that the county of Santa Cruz and the Treasurer thereof had no right to the same or the proceeds thereof.

Prior to said amendment of 1930, a National Bank could not legally pledge its assets to secure funds of a state or a political subdivision thereof. Marion v. Sneeden, 291 U. S. 262. The Supreme Court is emphatic in the view that the power did not exist prior to said amendment and the question is no longer an open one. In Marion v. Sneeden, a pledge of a National Bank subsequent to the passage of said amendment was held illegal for the reason that Illinois banks are not authorized to pledge their assets under the laws of said State. In Texas and Pacific Railroad Co. v. Pottorff, 291 U. S. 245, a pledge by a National Bank made subsequent to said amendment to secure a private deposit was held illegal as unauthorized by said amendment, and in U. S. Shipping Board et al v. Rhodes, 79 Fed. 2d, 146, U. S. Supreme Court, October Term, Pledges made to secure deposits of the U. S. Fleet Corporation and the Alien Property Custodian were held invalid as not being public moneys specified in said amendment. In the instant case, the bonds delivered by the Nogales Bank in 1928, to the New

York Bank remained with the latter in escrow for seventeen months after the passage of said amendment and for four months after the closing of the bank and no demand was made by the receiver for the return of the bonds until [45] January 21, 1936, and no change was made in the amount remaining on deposit in said bank to the credit of the county of $50,000.00 from June 1, 1928, to date. The Act of June 25, 1930, was not retroactive. Ross Receiver v. Lee, Comptroller, U. S. District Court, Southern District of Florida, not yet reported. In that case all transactions had been completed and the bank closed and a receiver appointed prior to the passage of the enabling act. On June 25, 1930, the Nogales Bank was solvent and a going concern. On April 10, 1931, the New York Bank returned to the Nogales Bank the Water Users' Association Bonds deposited with it March 14, 1921, and on the same date the Nogales Bank delivered to the New York Bank other Water Users' Association bonds to be held by said New York Bank as specified in the receipt issued for said bonds. This constitutes the only transaction between the Nogales Bank and the Treasurer of said Santa Cruz County other than the retention of the deposits subsequent to the enactment of the amendment of June 25, 1930, and the closing of the bank.

The plaintiff relies on Lewis v. Fidelity Co., 292 U. S. 559, and Kavanaugh v. Fash, supra. In the Lewis case a bond executed in 1928 for the period of four years was held vitalized by said amendment

and effective without the formality of executing a new bond for subsequent deposits of public money, the transaction being contemplated by the parties as a continuing one in which they intended that the lien should be operative for the period of the bond. The decision leaves unanswered the precise question whether the amendment would have validated the lien in respect to deposits made before that date. In Kavanaugh v. Fash, supra, the Circuit Court of Appeals of the Tenth Circuit held that said enabling act vitalized the previously made pledge with respect to money deposited after it became effective, but the case was disposed of on the pleadings though the answer disclosed a repledging of the bonds subsequent to June 25, 1930.

Where the right to pledge securities by a National Bank has been denied the basis of such denial has been the lack of power in the bank to do so; Texas & Pacific Co. v. Pottorff, supra, and cases there cited. Likewise the pledge cannot be ratified by the [46] parties because it could not be authorized by them. No performance can give it any validity or be the foundation of any right of action upon it. Central Transportation Co. v. Pullman Car Co. 139 U. S. 24; Texas & Pacific Railroad Co. v. Pottorff, supra. In the instant case, the pledge was made before the power to make the pledge existed in the bank. The pledge was intended as a continuing one to run until the repayment of the deposits, and extended until the closing of the bank in De-

cember 1931, seventeen months after the amendment became effective. The appointment of the depository was within the power of the state to confer and the bank to accept, but by reason of the paramount Federal law the pledge could not arise. When that obstacle was removed by the amendment the original agreement could as to the future have full effect. Lewis v. F. & D. Co., supra, "The plain purpose of the amendment was to remove any doubt of the power of National Banks to give security for public deposits, and in that respect to enable them to invite public deposits on an equal footing with state banks." Capital Savings and Loan Association v. Olympia National Bank, 80 Fed. 2d 561. (9th Cir). Upon the passage of the amendment the Nogales National Bank was empowered to pledge its security and to ratify an executory or continuing pledge, previously beyond its power. It was not necessary to go through the formality of executing a new pledge. Lewis v. F. & D. Co., supra. It seems apparent that the retention of the deposit by the bank, and the holding of the security intended to secure the former, for seventeen months after the bank was authorized to enter into just such a transaction as this, constituted a ratification of the delivery of the securities for the purposes intended by the parties of securing the deposits left by the county in the Nogales Bank.

Since this case was heard and submitted, a case in which the same questions were presented, decided

on February 29, 1936, has come to our attention, viz., Ross v. Knott, 13 Fed. Sup. 936, in which it is held that a pledge made by a National Bank prior to June 25, 1930, was effective to secure the balance of deposits made before the act was passed, remaining with the bank on its closing subsequent to the act. In disposing of the question as [47] to deposits remaining on hand at the time of the amendment, the Court says:

> "To say that the original agreement of the parties may be given the effect intended as to deposits made after June 25, 1930, but not as to unpaid balances remaining on deposit after that date is to sacrifice equitable principles upon the altar of tenuous distinction. In each situation, the relation of the bank and the depositor is the same, that of debtor and creditor."

It seems that the reasoning in the case of Ross v. Knott, supra, following that of Lewis F. & D. Co., supra, is sound and should be followed in this case. The plaintiff is therefore entitled to foreclose its lien on the pledged bonds to satisfy the amount of said deposit remaining unpaid, accounting to said defendant, and paying to the defendant any overplus therefrom and to return to the defendant bonds remaining unsold upon satisfaction of said balance of said deposit. As the right to foreclose the county's lien on said bonds existed and inured to the plaintiff at the time of the closing of the bank, no interest

is allowable on the balance remaining unpaid subsequent to said date. The relief prayed for in the counterclaim will be denied and the action as to the defendants Ackley and Dumbauld dismissed.

Findings and a form for decree may be submitted in accordance with the foregoing.

Dated this 21st day of July, 1936.

ALBERT M. SAMES,
Judge.

[Endorsed]: Filed Jul. 21, 1936. [48]

[Title of Court.]

May 1936 Term At Tucson

Minute Entry of Tuesday, July 21, 1936.
(Tucson Equity Minutes)

Honorable ALBERT M. SAMES, Judge United States District Court, Presiding.

[Title of Cause.]

ORDER FOR DECREE.

This cause having been heretofore submitted and by the Court taken under advisement and the Court having duly considered the same and being fully advised in the premises,

IT IS ORDERED that a Decree be entered in favor of the Plaintiff as against the Defendant W. J. Donald, as receiver of The Nogales National Bank, a national banking association, and that this case be dismissed as to the Defendants Anna B.

Ackley, as Treasurer of Santa Cruz County, Arizona, and A. Dumbauld, and that an exception be entered on behalf of W. J. Donald, as Receiver of The Nogales National Bank.

IT IS FURTHER ORDERED that counsel for the Plaintiff prepare Findings of Fact, Conclusions of Law and Decree accordingly for the signature of the Court. [49]

[Title of Court and Cause.]

ORDER.

Upon stipulation of the parties, and good cause existing therefor, it is

ORDERED that C. E. Hull as Receiver of The Nogales National Bank, a national banking association, be and he hereby is substituted as defendant in the above entitled action in the place of defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association.

Dated this 29th day of July, 1936.

By the Court:

ALBERT M. SAMES,

Judge of said District Court.

[Endorsed]: Filed Jul. 29, 1936. [50]

[Title of Court and Cause.]

OBJECTIONS TO JUDGMENT AND DECREE.

Comes now the defendant, by his attorney Stephen D. Monahan, and for objection to the proposed judgment and decree presented to this Court, urges the following:

1. That the findings beginning with line 24 of page 1 and ending with line 7 of page two are not in accordance with the law, in that the purported pledge was illegal and ultra vires.

2. That the said judgment and decree contains findings as to the details of the purported pledge beginning with the words "the condition" on line 25 of page 2 and ending with the word "interest" on line 30 of page 2 that are not in accordance with the agreed facts, in that there was no stipulation as to the condition of the illegal pledge.

3. That beginning with the words "on which" in line 1 of page 3 and ending with the words "became due and payable" is a conclusion of law that is incorrect and erroneous, in that on the declaration of insolvency and appointment of a receiver by the Comptroller of the U. S. Currency the assets of said bank passed to the Comptroller to be administered and distributed by him in accordance with the national banking act.

4. That the provisions in line 25 on page 3 for 6% interest from date of judgment is in contravention of this Honorable Court's [51] decision and

the law, in that no interest can be paid on this said deposit subsequent to insolvency.

5. That the finding beginning with the words "that since" on line 6 on page 3 and ending with the word "deposit" in line 10 of page 3, treats the sale of fifteen Pima County School District number One bonds of the par value of $15,000.00 on December 27, 1932, by A. Dumbauld, the then County Treasurer, for the sum of $14,257.16, as a payment by the receiver.

6. That the judgment beginning with line 16 of page 3 and extending to the end of said proposed judgment is erroneous and contrary to law in that it includes in its operations the bonds described as follows: beginning with line 27 of page 1 and extending through line 7 of page 2.

STEPHEN D. MONAHAN
Attorney for Defendant.
La Ville de Paris Bldg.
Nogales, Arizona.

[Endorsed]: Filed Aug. 17, 1936. [52]

[Title of Court.]

May 1936 Term At Tucson

(Minute Entry of Monday, September 14, 1936.)
(Tucson Equity Minutes)

Honorable ALBERT M. SAMES, Judge, United States District Court, Presiding.

[Title of Cause.]

Plaintiff's proposed Judgment and Decree and Defendants' objections thereto come on regularly for hearing this day,

James V. Robins, Esquire, appears as counsel for the Plaintiff, and Stephen D. Monahan, Esquire appears as counsel for the Defendants, and Argument is now had by respective counsel, and

IT IS ORDERED that said proposed judgment and decree and defendant's objections thereto be submitted and by the Court taken under advisement. [53]

[Title of Court.]

May 1936 Term At Tucson

Minute Entry of Wednesday, September 16, 1936.

Honorable ALBERT M. SAMES, Judge, United States District Court, Presiding.

[Title of Cause.]

Defendant's objections to plaintiff's proposed form of judgment and decree having been heretofore argued, submitted and by the Court taken under

advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that defendant's objections one, two, three, five and six be and the same are hereby overruled, and that defendant's objection number four be and the same is hereby allowed.

Whereupon, judgment is entered as follows: [54]

In the District Court of the United States in and for the District of Arizona.

In Equity—E-234-Tucson.

SANTA CRUZ COUNTY, a body politic and corporate,

Plaintiff,

vs.

C. E. HULL, as Receiver of The Nogales National Bank, a national banking association, ANNA B. ACKLEY, as Treasurer of Santa Cruz County, Arizona, and A. DUMBAULD,

Defendants.

JUDGMENT AND DECREE.

This cause came on to be heard in its regular order on the 16th day of June, 1936, before the Court sitting without a jury, a trial by jury having been waived. The plaintiff and defendants Anna B. Ackley, as Treasurer of Santa Cruz County, Arizona, and A. Dumbauld appeared by their solicitor,

James V. Robins, and defendant, W. J. Donald, as Receiver of The Nogales National Bank, a national banking association, appeared by his solicitor, Stephen D. Monahan, Esq., whereupon the case was submitted to the Court for its deliberation and decision upon an agreed written statement of the case and the arguments of counsel. And the Court having duly considered the facts and the law, finds as follows:

That plaintiff, Santa Cruz County, is the owner and holder of a pledge lien upon the following described bonds, the property of the Receiver of said The Nogales National Bank, to-wit:

> Twenty-one (21) City of Nogales Waterworks Improvement bonds issued by the City of Nogales, a municipal corporation in the State of Arizona, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twenty-three (23) to forty-three (43), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent. per cent. per annum payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the [55] payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each;
>
> Also, nine (9) City of Nogales Sewage Disposal bonds issued by said City of Nogales, said

bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twelve (12) to twenty (20), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent. per annum, payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each;

Also, two (2) bonds issued by Salt River Valley Water Users' Association, an Arizona corporation, known as "Stewart Mountain Water Project 5½% Serial Gold Bonds", numbered M473 and M500, dated June 1, 1928, of the denomination of One Thousand ($1,000.00) Dollars, each, bearing interest at the rate of five and one-half (5½%) per cent. per annum, payable semi-annually on April 1 and October 1, of each year; together with seven (7) coupons in the sum of Twenty-seven and 50/100 ($27.50) Dollars each attached to each of said bonds, numbered from fifteen (15) to twenty-one (21) both inclusive;

Also, three (3) bonds issued by said Salt River Valley Water Users' Association, numbered M1022 M1549 and M1550, dated February 1, 1923, of the denomination of One Thousand ($1,000.00) Dollars each, bearing interest

at the rate of six (6%) per cent, per annum, payable semi-annually on February 1 and August 1 of each year, together with the consecutively numbered coupons for the payment of the interest in the sum of Thirty ($30.00) Dollars each, attached to each of said bonds.

That said bonds and coupons are in the possession of the plaintiff.

That said bonds and coupons were pledged by said The Nogales National Bank to plaintiff as security for payment to plaintiff of the public monies and funds of plaintiff on deposit with said The Nogales National Bank, the condition thereof being that said The Nogales National Bank will promptly pay said public monies to the County Treasurer of said Santa Cruz County upon lawful demand therefor, and will, whenever thereunto required by law, pay to said County Treasurer such monies with interest. That said The Nogales National Bank was declared to be insolvent and a receiver thereof was appointed by the Comptroller of Currency of the United States on December [56] 16th, 1931, on which day the monies and funds of plaintiff so on deposit in the sum of Fifty Thousand ($50,000.00) Dollars, together with interest thereon for the month of November, 1931, in the sum of One Hundred Sixty-six and 66/100 ($166.66) Dollars, a total sum of Fifty Thousand One Hundred Sixty-six and 66/100 ($50,166.66) Dollars, became due and payable. That since the closing and insolvency of

said The Nogales National Bank, the sum of Forty-four thousand One Hundred Ninety-eight and 41/100 ($22,198.41) Dollars has been paid to plaintiff upon said deposit, and that said deposit, secured by said pledge lien upon said bonds, remains unpaid in the sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5968.25) Dollars.

And C. E. Hull, as Receiver of said The Nogales National Bank, having been substituted as defendant in this action in place of W. J. Donald, as such Receiver.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the amount so owing to plaintiff upon said deposit, to-wit, said sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5968.25) Dollars, is secured by a pledge lien upon all of said bonds and coupons, and said lien is hereby foreclosed; that a special execution shall issue as provided by law and the rules of this Court, directing the Marshal to sell said bonds and coupons, or so much thereof as may be necessary to satisfy said sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5968.25) Dollars and costs and accruing costs, as under execution; and that the proceeds of sale thereof be applied on said amount so due plaintiff, costs and accruing costs, and that the plaintiff, or any party to this suit, may become the purchaser or purchasers at said sale; and that all of said bonds and/or coupons so sold shall be delivered to the purchaser or

purchasers thereof, and that any of said bonds and coupons which shall not be so sold and any surplus of the proceeds of said sale after payment to plaintiff of the amount so due with interest, costs and ac- [57] cruing costs, shall be delivered to defendant, C. E. Hull as such Receiver.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover its costs herein taxed and allowed at the sum of.....

For all of which let execution issue.

Done in open Court this 16th day of September, A. D. 1936.

ALBERT M. SAMES
Judge of said District Court. [58]

(Plt'f Proposed Judg & Decree.)

[Endorsed]: Filed Aug. 19, 1936.

(Judgment and Decree.)

[Endorsed]: Filed Sep 16 1936. [59]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

1. That plaintiff, Santa Cruz County, is a body politic and corporate within the State of Arizona. That The Nogales National Bank was at all times herein mentioned a national banking association duly created, organized and existing under the laws of the United States and having its place of busi-

ness at the City of Nogales, Santa Cruz County, Arizona. That said banking association ceased doing business on December 1, 1931, and that said banking association was declared to be insolvent and a Receiver of said banking association was duly appointed by the Comptroller of Currency of the United States on December 16, 1931. That defendant, W. J. Donald, was duly appointed the Receiver of said banking association on February 11, 1932, to take effect at the close of business on February 13, 1932, by F. G. Awalt, acting Comptroller of the Currency of the United States. That thereupon said W. J. Donald took possession of all of the property and assets of said insolvent banking association and since February 13, 1932, has been, and now is the duly appointed, qualified and acting Receiver of said banking [60] association and all of its property and assets.

2. That said Anna B. Ackley was during the years 1925, 1926, 1927 and 1928 the duly elected, qualified and acting Treasurer of said Santa Cruz County; that during the years 1929, 1930, 1931 and 1932 A. Dumbauld was the duly elected, qualified and acting Treasurer of said County; that said Anna B. Ackley during the years 1933, 1934 and 1935 was and now is the duly elected, qualified and acting Treasurer of said County; that said Anna B. Ackley is a resident of Santa Cruz County, Arizona, and that said A. Dumbauld is a resident of Maricopa County, Arizona.

3. That heretofore, on January 3, 1925, the said Anna B. Ackley, as Treasurer, aforesaid, deposited

in The Nogales National Bank the sum of Thirty Thousand Seven Hundred Two and 67/100 ($30,702.67) Dollars and that various and sundry amounts were so deposited from time to time by her until on or about May 7, 1928, when the total of said sums so deposited was the sum of Fifty Thousand ($50,000.00) Dollars; that on January 2, 1929, the said sum was transferred on the books of said bank to the account of A. Dumbauld, as Treasurer of Santa Cruz County; that since June 1, 1928, no deposits of money or credits of any kind have been made in the said account; that the said account stood in the name of A. Dumbauld, as Treasurer aforesaid, at the time of the closing of said bank and the appointment of a Receiver therefor; that since January 2, 1933, the account has stood on the books of the said bank and now so stands in the name of Anna B. Ackley, as Treasurer of Santa Cruz County, aforesaid.

4. That said The Nogales National Bank was, prior to June 28, 1928, appointed and designated by the County Treasurer of Santa Cruz County, Arizona, with consent of the Board of Supervisors of said County, to be a depository of the monies of said County, and that said sum of Fifty Thousand ($50,000.00) Dollars so deposited was money belonging to said County. That on June 28, 1928, said banking association delivered to The National City Bank of New York, [61] a banking association or corporation doing business in the City and State of New York, the following described bonds, together with the coupons thereto attached, to-wit:

Twenty-one (21) City of Nogales Waterworks Improvement bonds issued by the City of Nogales, a municipal corporation in the State of Arizona, for the purpose of acquiring funds to improve the water distribution system of said City; said bonds being of the denomination of One Thousand ($1000) Dollars each, numbered serially from twenty-three (23) to forty-three (43), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent per annum payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds in the sum of Twenty-two and 50/100 ($22.50) Dollars each, coupon number fifteen (15), the lowest numbered coupon attached to each of said bonds, being payable on June 1, 1935, and the highest numbered coupon attached to each of said bonds being payable on the same date as the bond to which the same is attached.

Also, nine (9) City of Nogales Sewage Disposal bonds issued by said City of Nogales for the purpose of acquiring funds to improve the sewage disposal system of said City, said bonds being of the denomination of One Thousand ($1000) Dollars each, numbered serially from twelve (12) to twenty (20), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent per annum, payable on June 1 and December 1 of

each year; together with consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds in the sum of Twenty-two and 50/100 ($22.50) Dollars each, coupon number fourteen (14), the lowest numbered coupon attached to each of said bonds, being payable on December 1, 1934, and the highest numbered coupon attached to each of said bonds being payable on the same date as the bond to which the same is attached.

That thereafter, on June 28, 1928, said The National City Bank of New York issued its escrow receipt set forth on pages five and six of the answer and counter-claim of defendant, W. J. Donald, as such Receiver.

5. That on March 14, 1928, said The Nogales National Bank delivered to said The National City Bank of New York fifteen (15) certain bonds of Pima County School District Number One of the aggregate par value of Fifteen Thousand ($15,000.00) Dollars, and five (5) certain bonds of the Salt River Valley Water Users' Association of the aggregate par value of Five Thousand ($5,000.00) Dollars, and thereupon said The National City Bank of New York issued the escrow receipt set forth on page four of the answer and counter-claim of defendant, W. J. Donald, as such Receiver. That thereafter on or about [62] April 10, 1931, said Salt River Valley Water Users' Association bonds

were redelivered to said The Nogales National Bank.

6. That on or about April 10, 1931, said The Nogales National Bank delivered to said The National City Bank of New York the bonds described in the receipt hereinafter set forth, whereupon said The National City Bank of New York issued therefor its receipt as follows:

"ESCROW RECEIPT

"We hereby acknowledge receipt from The Nogales National Bank, Nogales, Arizona, of the following securities:

"$2,000 Salt River Valley Water Users' Association Stewart Mountain Power Project 5½% Serial Gold Bond due Oct. 1, 1935 with Oct. 1, 1931 & X. C. A. No. M117, 116 for $1,000 each.

"$2,000 Salt River Valley Water Users' Association Stewart Mountain Power Project 5½% Serial Gold Bond due Oct. 1, 1938 with Oct. 1, 1931 & S. C. A. No. M500, 473 for $1,000 each.

"$1,000 Salt River Valley Water Users' Association 6% Gold Bond due Feb. 1, 1943 with August 1, 1931 & S. C. A. No. M1022 for *for* $1,000 each.

"$2,000 Salt River Valley Water Users' Association 6% Gold Bond due February 1, 1946 with August 1, 1931 & S. C. A. Nos. M1549/50 for $1,000 each,

to be held in escrow upon the following terms and conditions.

"1. To surrender all or any part of said securities at any time to said The Nogales National Bank, Nogales, Arizona, at its request, upon receipt of a statement in writing signed by the then County Treasurer of Santa Cruz County, Arizona, acknowledging that said Santa Cruz County has no interest in the securities so surrendered.

"2. To collect the interest coupons maturing on said securities so long as same remain in our possession hereunder, and to pay over the proceeds thereof to said The Nogales National Bank, Nogales, Arizona.

"3. To deliver any and all of such securities remaining in our possession hereunder at any time after the 10th day of April, 1931, to the then County Treasurer of Santa Cruz County, Arizona, upon his written demand therefor, to be held by said County Treasurer for the benefit of said Santa Cruz County, Arizona, and of said The Nogales National Bank, Nogales, Arizona, as their respective interest may appear, but without any responsibility on our part for any disposition thereof which may be made by him.

"4. We may at any time act in reliance upon the signature of any person purporting to act as County Treasurer, without liability of any kind

therefor, either to said Santa Cruz County, Arizona, or to said The Nogales National Bank, Nogales, Arizona, or to any other claimant, but we shall not be required to do so, and may in our discretion at any time require such evidence of the [63] signature and authority of such County Treasurer as may be satisfactory to our attorneys.

"5. We are not to be required to keep any of said securities insured against any risks whatever, nor are we to be responsible for the safekeeping of said securities except to give them the same care as we do our own property.

"6. The Nogales National Bank, Nogales, Arizona, is to pay any and all expenses which we may incur, and to indemnify and save us harmless against any and all loss and damages which we may suffer or sustain hereunder or in connection herewith.

"7. We may act in reliance upon advise of counsel in reference to any matters in connection with this escrow, and shall not be liable for any mistake of fact or error of judgment, or for any acts or omissions of any kind, unless caused by our own willful misconduct.

"Executed in duplicate, this 10th day of April, 1931.

"THE NATIONAL CITY BANK
OF NEW YORK.
By J. M. MORRISON,
Assistant Cashier."

7. That the bonds hereinabove described with the coupons attached thereto were so delivered to said The National City Bank of New York by said The Nogales National Bank as security for payment of the public monies and funds of plaintiff so on deposit with said The Nogales National Bank. That all of said money was on deposit with said The Nogales National Bank for more than six months prior to the closing of said bank, but was subject to check or draft at all times.

8. That since the closing of said bank dividends have been paid to said Treasurer by said Receiver on the following dates and in the following amounts, to-wit:

August 8, 1932	$13,545.00
December 26, 1933	5,016.67
November 23, 1934	4,013.33
Total	$22,575.00

9. That on or about April 4, 1932, all of the bonds then remaining in its possession were delivered to the County Treasurer of said County of said County by said The National City Bank of New York, and that none of said bonds, nor the proceeds thereof, (except as hereinabove set forth) have been delivered to said The Nogales National Bank, or its Receiver, but that all thereof which have not been sold or [64] paid are in the possession of the County Treasurer of said Santa Cruz County.

10. That on or about December 27, 1932, A. Dumbauld, as County Treasurer of said Santa Cruz County sold said Pima County School District bonds of the par value of Fifteen Thousand ($15,000.00) Dollars on the market for the sum of Fourteen Thousand Two Hundred Fifty-seven and 16/100 ($14,257.16) Dollars, said sum being the market value thereof at the time of such sale, and that the proceeds thereof are now in the possession of the present Treasurer of said Santa Cruz County.

11. That on or about October 1, 1933, said A. Dumbauld as such County Treasurer surrendered to Salt River Valley Water Users' Association for payment the Two Thousand ($2,000.00) Dollars Salt River Valley Water Users' Association bonds numbered M117, 116, described in the escrow receipt above set forth on page four of this agreed statement of the case, and that said bonds were paid to said County Treasurer.

12. That since the date of closing said The Nogales National Bank, said deposit of Fifty Thousand ($50,000.00) Dollars, with interest thereon from the month of November, 1931, in the sum of One Hundred Sixty-six and 66/100 ($166.66) Dollars, has been credited on the books of said County Treasurer with the following sums received by said Treasurer on account of dividends upon said deposit, the sale of said bonds and payment of said bonds as hereinabove mentioned, and sums received by said Treasurer upon payment of interest coupons attached to said bonds, as follows:

April 11, 1932	$ 110.00
June 21, 1932	675.00
August 8, 1932	13,545.00
September 7, 1932	90.00
October 20, 1932	375.00
October 22, 1932	110.00
December 2, 1932	675.00
December 27, 1932	14,257.16
May 3, 1933	90.00
June 20, 1933	110.00
June 20, 1933	675.00
August 25, 1933	89.75 [65]
October 1, 1933	2,000.00
October 5, 1933	54.46
November 16, 1933	54.79
December 8, 1933	675.00
December 26, 1933	5,016.67
February 19, 1934	90.00
April 28, 1934	55.00
August 14, 1934	89.75
September 12, 1934	472.50
November 22, 1934	202.50
November 23, 1934	4,013.33
December 31, 1934	55.00
February 28, 1935	90.00
April 20, 1935	55.00
June 15, 1935	472.50
Total	$44,198.41

and that said sum of Forty-four Thousand One Hundred Ninety-eight and 41/100 ($44,198.41) Dol-

lars is now in possession of the present Treasurer of said Santa Cruz County. That no further payments or credits upon said account have been made.

13. That on January 21, 1936, the defendant W. J. Donald, as such Receiver, made demand for the return of said bonds or the proceeds thereof, on Anna Ackley and on A. Dumbauld each, by depositing in the United States Post Office, registry division, an envelope bearing the required United States postage, addressed to A. Dumbauld at his address in Phoenix, and a similar envelope addressed to Anna B. Ackley at Nogales, Arizona, and each envelope containing the following demand:

> Anna B. Ackley,
> Treasurer of Santa Cruz County
> State of Arizona,
> and
> A. Dumbauld,
> Ex-Treasurer of Santa Cruz County,
> State of Arizona.
>
> I hereby demand that you deliver up and return to me as the duly appointed, qualified and acting Receiver of The Nogales National Bank, an insolvent national banking association, the following described bonds held by you in violation of the National Banking laws of the United States of America:
>
> Twenty-one Thousand ($21,000) Dollars City of Nogales Waterworks Improvement bonds, 4½% due December 1, 1953, with December 1, 1928, and subsequent coupons attached, Nos.

23/43 for One Thousand ($1,000) Dollars each, or the proceeds thereof if disposed of and any interest collected by you, or either of you. [66]

Nine Thousand ($9,000) Dollars City of Nogales Sewage Disposal bonds 4½% due December 1, 1951, with December 1, 1928, and subsequent coupons attached Nos. 12/20 for One Thousand ($1,000) Dollars each, or the proceeds thereof if disposed of and any interest collected by you, or either of you.

Fifteen Thousand ($15,000) Dollars County of Pima School District No. 1 School Bldg. bonds 5% due March 1, 1939, with September, 1928, and subsequent coupons attached Nos. 17/31 interest payable March and September, One Thousand ($1,000) Dollars each, or the proceeds thereof if disposed of and any interest collected by you, or either of you.

The above described bonds were and are the property of The Nogales National Bank of Nogales, Arizona, now insolvent.

Dated January 16, 1936.

W. J. DONALD,
Receiver of The Nogales National Bank of Nogales, Arizona, an insolvent national banking association.

That said A. Dumbauld and said Anna B. Ackley, and each of them, have failed and refused to deliver to said Receiver any of said bonds or the proceeds thereof.

14. That the answer and counter-claim of the defendant, W. J. Donald, as such Receiver, is filed by direction of the Comptroller of the Currency; that the amount involved, exclusive of interest and costs, exceed the sum of Three Thousand ($3,000) Dollars; that said action is one for winding up the affairs of a national banking association, and that the action is one brought under the laws of the United States and involves the construction of a United States statute.

STIPULATION.

It is hereby stipulated by and between the plaintiff, Santa Cruz County, and the defendants, Anna B. Ackley and A. Dumbauld, by their attorney, James V. Robins, and the defendant, C. E. Hull as Receiver, by his attorney, Stephen D. Monahan, that the above and foregoing statement of evidence is a true and complete statement of the evidence upon which the above entitled cause was tried and that the same be accepted as such for the purposes of the record on appeal.

Dated November 20th, 1936. [67]

JAMES V. ROBINS,

Attorney for Santa Cruz County, Plaintiff, and Anna B. Ackley and A. Dumbauld, Defendants.

STEPHEN D. MONAHAN,

Attorney for Defendant, C. E. Hull, as Receiver of The Nogales National Bank, insolvent.

CERTIFICATE OF JUDGE TO STATEMENT OF EVIDENCE.

On this 24th day of November, 1936, pursuant to stipulation of counsel for settlement and certification of the statement of facts in the foregoing entitled action, the undersigned Albert M. Sames, judge of said court presiding at the trial of said action, now and hereby settles the annexed and foregoing statement of evidence as the statement of facts in said action and hereby certifies:

That the above and foregoing action was tried before the court without a jury on the foregoing statement of evidence as an agreed statement of facts stipulated by counsel of all the parties thereto, and that there was no other evidence of any kind offered or received at the said trial, and that the same contains all of the evidence on which the said cause was tried and all the material facts, matters and proceedings heretofore occurring in said cause.

Done at Tucson, Arizona, this 24th day of November, 1936.

ALBERT M. SAMES,
Judge of U. S. District Court.

(Defts Proposed Statement of Evidence)

[Endorsed]: Filed Nov 23 1936.

(Statement of Evidence)

[Endorsed]: Filed Nov 24 1936. [68]

[Title of Court.]

November 1936 Term At Tucson

Minute Entry of Tuesday, November 24, 1936

Honorable ALBERT M. SAMES, Judge, United States District Court, Presiding.

[Title of Cause.]

Pursuant to stipulation of counsel herein,

IT IS ORDERED that Defendant's proposed statement of evidence heretofore filed herein be and the same is hereby settled. [69]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

The defendant, C. E. Hull, Receiver of The Nogales National Bank, a national banking association, in connection with and as a part of his petition for the allowance of an appeal filed herein, makes the following assignment of errors, which he avers were committed by the Court in the rendition of judgment against this defendant.

I.

The judgment of the Court below is contrary to law.

II.

The judgment of the Court below is contrary to the agreed statement of facts.

III.

The Court below erred in finding that the plaintiff, Santa Cruz County, is the owner and holder of a pledge lien upon the following described bonds, the property of the Receiver of said The Nogales National Bank, to-wit:

> Twenty-one (21) City of Nogales Waterworks Improvement bonds issued by the City of Nogales, a municipal corporation in the State of Arizona, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twenty-three (23) to forty-three [70] (43), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent per annum payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each;
>
> Also, nine (9) City of Nogales Sewage Disposal Bonds issued by said City of Nogales, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twelve (12) to twenty (20), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent. per annum, payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being

attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each;

IV.

The Court below erred in finding that said bonds and coupons were pledged by said The Nogales National Bank to plaintiff as security for payment to plaintiff of the public monies and funds of plaintiff on deposit with said The Nogales National Bank, the condition thereof being that said The Nogales National Bank, will promptly pay said public monies to the County Treasurer of said Santa Cruz County upon lawful demand therefor, and will, whenever thereunto required by law, pay to said County Treasurer such monies with interest.

V.

That Court below erred in finding that since the closing and insolvency of said The Nogales National Bank, the sum of Forty-four Thousand One Hundred Ninety-eight and 41/100 ($44,198.41) Dollars has been paid to plaintiff upon said deposit, and that said deposit, secured by said pledge lien upon said bonds, remains unpaid in the sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars.

VI.

The Court below erred in ordering, adjudging and decreeing that the amount of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars (or any other amount) is secured by a pledge lien upon all of said bonds and coupons, and

said lien is hereby [71] foreclosed; that a special execution shall issue as provided by law and the rules of this Court, directing the Marshall to sell said bonds and coupons, or so much thereof as may be necessary to satisfy said sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars with costs, and accruing costs as under execution, and that proceeds of sale thereof be applied on said amount so due plaintiff, with costs and accruing costs.

VII.

The Court below erred in not finding that fifteen (15) certain bonds of the County of Pima school district No. 1, school building bonds bearing five (5%) per cent interest due March 1, 1939, with coupons attached, numbers 17 to 31 inclusive, of the par value of One Thousand ($1,000.00) Dollars each or the proceeds thereof, the sum of Fourteen Thousand Two Hundred Fifty-seven and 16/100 ($14,257.16) Dollars, are the property of the said The Nogales National Bank and in not ordering, adjudging and decreeing that such bonds or the said proceeds thereof be delivered to this defendant as receiver aforesaid.

VIII.

The Court below erred in not finding that the said twenty-one (21) City of Nogales Waterworks Bonds together with coupons attached and interest on the said bonds heretofore collected by the plaintiff, Santa Cruz County, its officers and agents, and the

said nine (9) City of Nogales Sewage bonds, together with coupons attached and interest on the said bonds heretofore collected by the plaintiff, Santa Cruz County, its officers and agents, are the property of the said The Nogales National Bank and in not ordering, adjudging and decreeing that such bonds, coupons, and interest so collected, be delivered to this defendant as receiver aforesaid.

STEPHEN D. MONAHAN,
Attorney for Defendant. [72]

I hereby accept service of the foregoing assignment of errors and acknowledge receipt of a true copy thereof at Nogales, within the District of Arizona, this 23 day of September, 1936.

JAMES V. ROBINS,
Attorney for Plaintiff. H

[Endorsed]: Filed Sep 24 1936. [73]

[Title of Court and Cause.]

PETITION.

To Honorable Albert M. Sames, Judge United States District Court, District of Arizona:

Comes now the defendant C. E. Hull, Receiver, and represents to the Court that on the 16th day of September, 1936, this Court entered a judgment and decree in favor of the plaintiff and against this defendant in the entering of which said judgment

and decree, certain errors were committed to the prejudice and injustice of this defendant, all of which will appear in detail from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that he may be allowed an appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit so that said errors, so complained of may be corrected, and that a transcript of this record, proceedings and documents in this cause, duly authenticated, may be sent to and filed with the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, within said circuit, for its consideration, as does the law and the rules of such Court in such cases made and provided, require. [74]

Said defendant further prays that, whereas this appeal is made by direction of the Comptroller of the United States Currency, an Order be entered directing that this defendant and appellant be not required to file a cost bond herein.

STEPHEN D. MONAHAN,
Attorney for Defendant.

I hereby accept service of written Petition for Appeal and acknowledge receipt of a true copy thereof at Nogales within the District of Arizona, this 23 day of September, 1936.

JAMES V. ROBINS,
Attorney for Plaintiff.

H

[Endorsed]: Filed Sep. 24, 1936. [75]

[Title of Court.]

May 1936 Term At Tucson

Minute Entry of Monday, October 5, 1936

Honorable ALBERT M. SAMES, Judge, United States District Court Presiding.

[Title of Cause.]

Defendant's Petition for Appeal comes on regularly for hearing this day.

Stephen D. Monahan, Esquire, appears as counsel for the Defendant and no counsel appears for the Plaintiff.

IT IS ORDERED that Defendant's Petition for Appeal be and the same is hereby granted.

Whereupon, the following order is entered: [76]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendant, C. E. Hull, Receiver, aforesaid, having within the time prescribed by law, duly filed herein his Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree of the above entitled District Court, made and entered in the above numbered and entitled cause under date of the sixteenth day of September, 1936, in favor of the Plaintiff and against the said Defendant.

It is ordered that the defendant's appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the District Court hereinabove referred to, be, and the same is, hereby allowed;

It is further ordered that a certified transcript of so much of the record as may be requested by proper praecipe therefore be, by the Clerk of this Court, upon the filing of such praecipe, transmitted to said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

It is further ordered, that this Appeal having been directed by the Comptroller of the United States Currency, that no bond be required. [77]

Done in open court this fifth day of October, 1936.

ALBERT M. SAMES,
Judge, United States District Court,
District of Arizona.

I hereby acknowledge and accept service of the foregoing Order Allowing Appeal and acknowledge receipt of a true copy thereof at Nogales, within the District of Arizona, this ..... day of ....., 1936.

....., Attorney for Plaintiff.

[Endorsed]: Filed Oct. 5, 1936. [78]

[Title of Court and Cause.]

ACCEPTANCE OF SERVICE.

Due service of the following described papers and pleadings in the above entitled cause is hereby accepted this 24 day of November, 1936, to-wit:

Petition for appeal
Order allowing appeal
Assignment of error
Citation on appeal
Statement of evidence.

JAMES V. ROBINS,
Attorney for plaintiff Santa Cruz County and
Defendants Anna B. Ackley and A. Dumbauld.

[Endorsed]: Filed Nov. 24, 1936. [79]

[Title of Court and Cause.]

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above entitled Court:

YOU ARE HEREBY DIRECTED to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit and to include therein the following:

1. Plaintiff's complaint.
2. Defendant's petition for removal to Federal Court.
3. Removal bond.
4. Order for removal.

5. Notice of filing record in the United States District Court.

6. Answer, separate defense of W. J. Donald and counterclaim.

7. Order making Anna B. Ackley and A. Dumbauld additional parties defendant.

8. Answer of Anna B. Ackley to complaint.

9. Answer of A. Dumbauld to complaint.

10. Answer of Santa Cruz County to separate defense and counterclaim of defendant.

11. Answer of Anna B. Ackley to separate defense and counterclaim of defendant.

12. Answer of A. Dumbauld to separate defense and counterclaim of defendant. [80]

13. Memorandum decision.

14. Judgment and decree.

15. Objections to judgment and decree.

16. Petition for appeal.

17. Assignment of error.

18. Appeal order.

19. Order substituting C. E. Hull for W. J. Donald as defendant.

20. Transcript of minute entries.

21. Statement of evidence.

22. Citation on appeal.

23. Praecipe for transcript.

24. Acceptance of service.

25. Notice of filing praecipe for record on appeal and all other records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said appeal as re-

quired by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 24 day of November, 1936.

STEPHEN D. MONAHAN.

Attorney for defendant C. E. Hull, Receiver.

Received a copy of the above and foregoing praecipe for record on appeal this 24 day of November, 1936.

JAMES V. ROBINS,

Attorney for plaintiff Santa Cruz County and defendants Anna B. Ackley and A. Dumbauld.

[Endorsed]: Filed Nov. 24, 1936. [81]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE FOR RECORD ON APPEAL.

To the plaintiff Santa Cruz County and to the defendants Anna B. Ackley and A. Dumbauld and to James V. Robins, their Attorney:

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE THAT on the 24 day of November, 1936, the undersigned filed with the Clerk of the United States District Court for the District of Arizona a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, upon appeal taken by the said defendant in the above numbered and entitled cause,

a copy of which praecipe is herewith served upon you.

Dated this 24 day of November, 1936.

STEPHEN D. MONAHAN,
Attorney for defendant C. E. Hull, Rec.

I hereby accept service of the above and foregoing notice and acknowledge receipt of a true copy together with a copy of the praecipe mentioned herein.

JAMES V. ROBINS,
Attorney for plaintiff Santa Cruz County and defendants Anna B. Ackley and A. Dumbauld.

[Endorsed]: Filed Nov. 24, 1936. [82]

[Title of Court.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the Custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Santa Cruz County, a body politic and corporate, Plaintiff, versus W. J. Donald, as Receiver of The Nogales National Bank, a national banking association, Anna B. Ackley, as Treasurer of Santa Cruz County, Arizona and A. Dumbauld, Defendants, numbered E-234-Tucson on the docket of said Court.

I further certify that the attached pages, numbered 1 to 86, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's Fee for preparing and certifying to this said transcript of record amounts to the sum of $17.40 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the Seal of the said Court this tenth day of December, 1936.

[Seal] EDWARD W. SCRUGGS,
Clerk. [83]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America to Santa Cruz County, a body politic and corporate, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Ap-

peals for the Ninth Circuit at San Francisco, California, within thirty days from the date of this writ, pursuant to an order allowing the appeal duly made, entered and filed in the office of the Clerk of the above named District Court, under date of the 5th day of October, 1936, which said appeal is from the final decree of said District Court in the above numbered and entitled cause, made and entered under date of the 16th day of September, 1936, wherein C. E. Hull, Receiver of the Nogales National Bank of Nogales, Arizona, a national banking association, is defendant and appellant and you are plaintiff and appellee, to show cause, if any there be, why said judgment and decree rendered against said defendant and appellant should not be reversed and set aside and why justice should not be done to the parties on that behalf.

WITNESS the Honorable Albert M. Sames, United States District Judge for the District of Arizona, this 24th day of November, 1936, A. D., and of the Independence of the United States of America the One Hundred Sixty-first.

[Seal] ALBERT M. SAMES,
Judge of the United States Dist. Court
in and for the Dist. of Ariz. [84]

I hereby accept service of the within citation on appeal and acknowledge receipt of a true copy thereof and personal service of citation at Nogales, Arizona, this 24th day of November, 1936.

JAMES V. ROBINS,

Attorney for plaintiff Santa Cruz County and defendants Anna B. Ackley and A. Dumbauld.

[Endorsed]: Filed Nov. 24, 1936. [85]

[Endorsed]: No. 8408. United States Circuit Court of Appeals for the Ninth Circuit. C. E. Hull, Receiver of the Nogales National Bank of Nogales, Arizona, a national banking association, Appellant, vs. Santa Cruz County, a body politic and corporate, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the District of Arizona.

Filed December 11, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8408

United States
Circuit Court of Appeals

For the Ninth Circuit

C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,

Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,

Appellee.

Brief for Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

STEPHEN D. MONAHAN,
Nogales, Arizona,
Attorney for Appellant.

SUBJECT INDEX

TABLE OF CASES

Page

Page

Page

Page

No. 8408

United States
Circuit Court of Appeals

For the Ninth Circuit

C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,

Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,

Appellee.

Brief for Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

BASIS OF JURISDICTION

The United States District Court has jurisdiction in this matter by virtue of the provision of the Judicial Code, Title 28, Section 41, Subsection 16, which is as follows—Subsection 16. Suits against National Banking Associations commenced by direction of the United States or by direction of any officer thereof, against any National Banking Association, and cases for winding up the affairs of any such bank.

The United States District Court has jurisdiction in this matter by virtue of the provision of the Judicial Code Title 28, Section 41, Subsection 1, which is as follows: The District Court shall have original jurisdiction as follows: First on all suits of a civil nature at common law or in equity brought by the United States or by any officer thereof authorized by law to sue . . . or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and (a) arises under the Constitution or laws of the United States. . . . The answer and counterclaim or cross-complaint of the defendant at page 17 of the transcript of record, paragraph 5, contains a formal allegation that the amount in controversy is in excess of $3,000.00; that the action is one brought by direction of the Comptroller of the United States Currency; and that the action involved the construction of a United States statute.

> "Formal allegation that the amount in controversy is in excess of $3,000.00 is sufficient to give Federal District Court jurisdiction."
>
> KNOS, Inc. v. Associated Press, 57 S. Ct. 197.

The complaint of Santa Cruz County, pages 1 to 7, inclusive, transcript of record, sets forth an action against a National Banking Association and an action for winding up the affairs of a national bank. The answer and counterclaim or cross-complaint of the defendant at page 17, paragraph 5, of the transcript of record contains a formal allegation that the answer was filed by direction of the Honorable Comptroller of the

United States Currency; that the action is one for winding up the affairs of a national banking association. Title 28, Judicial Code, Section 41, Subsection 16, provides that District Courts shall have original jurisdiction of all cases commenced by the United States or by direction of any officer thereof, against any National Banking Association, and cases for winding up the affairs of any such bank.

> "National Bank Receiver is an officer of the United States."
>
> Steele v. Randall, 19 F. (2d) 42;
>
> United States v. Wetzel, 246 U. S. 510, 62 L. Ed. 872.

This complaint having been filed in the Superior Court was susceptible of removal to the United States District Court by virtue of the fact that it is an action arising under the laws of the United States and is an action in which the District Courts of the United States have original jurisdiction. The provision for removal appears in Title 28 of the Judicial Code, Section 71, which provides that any suit of civil nature in law or in equity arising under the constitution or laws of the United States, or any other suit of a civil nature in law or in equity of which the District Courts of the United States are given jurisdiction, in any state court may be removed into the District Court of the United States for the proper district.

The jurisdiction of the United States Circuit Court of Appeals is based on provisions of Title 28, Judicial

Code and Judiciary, Section 225, which is as follows: (Review of final decisions)—The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions— . . . Third . . . in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000.00. The amount prayed for in the complaint, page 1 of transcript of record at page 7, is $11,153.15 and the decree of the District Court, page 61 of the transcript of record, at page 65, gives judgment to the plaintiff for the sum of $5,968.25. The sum set forth in the answer and counterclaim or cross-complaint, page 15, of the transcript of record, at page 17, paragraph 5, is set forth as exceeding the sum of $3,000.00.

STATEMENT OF CASE

This is an appeal from a judgment and decree entered in the United States District Court for the District of Arizona at Tucson, Arizona, establishing a pledge lien of the plaintiff, Santa Cruz County, on securities owned by The Nogales National Bank and directing foreclosure of the lien and sale of such securities.

On December 31, 1935, the plaintiff and appellee Santa Cruz County, filed its complaint seeking to establish and foreclose a lien upon Twenty-one (21) City of Nogales Waterworks bonds of the par value of Twenty-one Thousand (($21,000.00) Dollars, Nine (9) City of

Nogales Sewage bonds of the par value of Nine Thousand ($9,000.00) Dollars, and Five (5) Salt River Valley Water Users Association bonds of the par value of Five Thousand ($5,000.00) Dollars.

The complaint was filed in the Superior Court of Santa Cruz County and on January 24th, 1936, defendant secured an order for removal to the United States District Court, for the District of Arizona, at Tucson, Arizona.

The complaint alleged the existence of the plaintiff as a body politic and corporate within the State of Arizona, the organization and existence of the defendant, the Nogales National Bank as a national banking association in the City of Nogales, County of Santa Cruz and State of Arizona, the closing of its doors on December 1st, 1931, declaration of insolvency by the Comptroller of the United States Currency on December 16, 1931, and appointment of a receiver. It alleged further the appointment of the defendant W. J. Donald as receiver on February 1, 1932, and his possession, as such receiver, of the assets of the bank at time of filing complaint. The complaint further alleged the designation of The Nogales National Bank by county authorities as a depository of county funds; the deposit of Fifty Thousand ($50,000.00) Dollars of county funds; the delivery on June 28, 1928, by The Nogales National Bank to the National City Bank of New York, Twenty-one City of Nogales Waterworks bonds of the par value of One Thousand ($1,000.00) Dollars

each, Nine City of Nogales Sewage bonds of the par value of One Thousand ($1,000.00) Dollars each, the delivery on April 10, 1931, of Five Salt River Valley Water Users Association bonds of the par value of One Thousand ($1,000.00) Dollars each; that all of said bonds were pledged as security for payment of public monies. The complaint further alleged on February 26, 1932, demand by the County Treasurer on the receiver for payment of money on deposit, with interest; that at the time of filing of the complaint Thirty-eight Thousand Eight Hundred Forty-six and 85/100 ($38,846.85) Dollars, together with interest to June 15, 1935, had been paid, and that Eleven Thousand One Hundred Fifty-three and 15/100 ($11,153.15) Dollars, with interest from June 15, 1935, at the rate of six (6%) per cent was due and unpaid; that the bonds so described were then in the possession of the County Treasurer.

W. J. Donald, as receiver, defendant filed his answer and counterclaim admitting and alleging that on January 3, 1925, Anna B. Ackley, as County Treasurer, deposited Thirty Thousand Seven Hundred Two and 7/100 ($30,702.07) Dollars of county money in The Nogales National Bank and subsequently other deposits until on or about May 7, 1928, there was so on deposit the sum of Fifty Thousand ($50,000.00) Dollars; that the account was transferred by her to her successor in office, A. Dumbauld on January 2, 1929; that since January 2, 1933, the bank's books have car-

ried the account in the name of Anna B. Ackley, the former treasurer and successor to A. Dumbauld, and that since June 1, 1928, no deposits of money or credits of any kind have been made in the account.

Defendant further alleged the delivery to the National City Bank of Fifteen (15) Pima County School bonds of the par value of Fifteen Thousand ($15,000.00) Dollars, and Five (5) Salt River Valley Water Users Association bonds of the par value of Five Thousand ($5,000.00) Dollars, on March 14, 1928, receiving in return an escrow receipt which implied an interest of the plaintiff in the bonds but set forth no terms nor conditions of a pledge as alleged in the complaint. That thereafter on June 28, 1928, The Nogales National Bank delivered to the National City Bank of New York Twenty-one (21) City of Nogales Waterworks bonds of the par value of Twenty-one Thousand ($21,000.00) Dollars, and Nine (9) City of Nogales Sewage bonds of the par value of Nine Thousand ($9,000.00) Dollars, receiving therefore an escrow receipt identical with the one above described; that subsequently during February, 1931, the then County Treasurer surrrendered the said Five (5) Salt River Valley Water bonds to the bank.

The defendant further alleged his demand, as receiver, on the County Treasurer, Anna B. Ackley, on January 21, 1936, for the return of the Twenty-one (21) Waterworks bonds of the par value of Twenty-one Thousand ($21,000.00) Dollars, Nine (9) Sewage bonds

of the par value of Nine Thousand ($9,000.00) Dollars, and Fifteen (15) Pima County School bonds of the par value of Fifteen Thousand ($15,000.00) Dollars, and alleged that their delivery to the New York City Bank in pledge or otherwise was illegal and *ultra vires.*

Defendant sought also to have Anna B. Ackley and A. Dumbauld made additional parties defendant and on order of the court were brought in. The relief sought by defendant was delivery of the bonds demanded on January 16, 1936, namely: Twenty-one Thousand ($21,000.00) Dollars in Nogales Waterworks and Improvement bonds, Nine Thousand ($9,000.00) Dollars in Nogales Sewage bonds, and Fifteen Thousand ($15,000.00) Dollars in Pima County School District Bonds, and in each case the interest collected subsequent to closing of bank, and proceeds thereof, if sold, together with an accounting. Defendant made no claim to Seven Thousand ($7,000.00) Dollars worth of Salt River Valley bonds pledged on April 10, 1931.

The case was tried before the court without a jury on an agreed statement of facts. The decision of the court upheld the validity of the purported pledge and decreed foreclosure and sale of the bonds under execution to satisfy a judgment for Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars, but denied plaintiff interest from the date of the receivership. Exception was entered on behalf of the defendant C. E. Hull, as receiver, who had been substituted for the previous defendant W. J. Donald.

In the court below, the plaintiff based its case on the proposition that the passage of the Amendment of June 25, 1930, validated the attempted pledge of securities as to deposits made prior to the passage of the act even though there had been no repledging of the securities sought to be recovered by defendant nor redepositing of funds after the passage of the act.

Defendant's position was that:

I.

Prior to the passage of the Amendment of the National Bank Act on June 25, 1930, national banks in Arizona were utterly without power to pledge their assets to secure deposits of funds of a state or political subdivision thereof, and any such attempted pledges were utterly illegal and void.

II.

That the passage of the Amendment did not validate pledges as to deposits made prior to June 25, 1930, unless there was a repledging of the securities sought to be recovered or redepositing of the funds, neither of which occurred in the instant case.

III.

A contract beyond the power of a corporation to make cannot be made valid by confirmation, ratification or estoppel and the conduct of the bank and receiver in apparently acquiescing in an illegal pledge is of no effect whatsoever.

IV.

To hold that the passage of the Amendment validated an illegal and *ultra vires* pledge as to deposits made prior to June 25, 1930, is to give the Amendment a retroactive operation.

V.

No law should be given a retroactive or retrospective operation unless such intention of the legislature is plainly expressed in the law.

VI.

A ratable distribution of this bank's assets should be had but would be impossible were these illegal pledges upheld.

VII.

No interest can be paid on deposits from and after date of receivership.

VIII.

The receiver may recover securities unlawfully pledged without making restitution to pledgee.

IX.

The receiver, appellant, is entitled to recover twenty-one (21) Nogales Waterworks bonds of the par value of Twenty-one Thousand ($21,000.00) Dollars together

with interest collected on same from date of closing of the bank; also

Nine (9) Nogales Sewage Disposal Bonds of the par value of Nine Thousand ($9,000.00) Dollars together with interest collected on same from date of closing of the bank; also

The sum of Fourteen Thousand Two Hundred Fifty-seven and 16/100 ($14,257.16) Dollars, being the sum realized by plaintiff on the sale of Fifteen (15) Pima County School bonds, together with interest collected on same since the closing of the bank, all of which bonds constituted the body of the illegal pledges.

SPECIFICATION OF ERROR RELIED UPON

The assignments of error are set forth in the record on pages 81 to 85, inclusive, and more particularly as follows:

No. I	page 81 of Record
No. II	page 81 of Record
No. III	page 82 of Record
No. IV	page 83 of Record
No. V	page 83 of Record
No. VI	page 83 of Record
No. VII	page 84 of Record
No. VIII	page 84 of Record

All are relied upon but assignments I, III, VI, VII, and VIII are of such a nature that the same argument applies to each, and accordingly, they will be argued as a whole.

The propositions involved in these assignments of error may properly be specified and set forth as follows:

I.

Prior to the passage of the Amendment of the National Bank Act on June 25, 1930 (Brief, p. 16), national banks in Arizona were utterly without power to pledge their assets to secure deposits of funds of a state or political subdivision thereof, and any such attempted pledges were utterly illegal and void.

II.

The passage of the Amendment did not validate pledges as to deposits made prior to June 25, 1930, unless there was a repledging of the securities or redepositing of the funds, neither of which occurred in the instant case.

III.

To hold that the passage of the Amendment validated an illegal and *ultra vires* pledge as to deposits made prior to June 25, 1930, is to give the Amendment a retroactive operation.

IV.

No law should be given a retroactive or retrospective operation unless such intention of the legislature is plainly expressed in the law.

V.

A contract beyond the power of a corporation to make cannot be made valid by confirmation, ratification or estoppel and the conduct of the bank and receiver in apparently acquiescing in an illegal pledge is of no effect whatsoever.

VI.

The receiver may recover securities unlawfully pledged without making restitution to pledgee.

VII.

Assets of National Bank paid out or disposed of under misapprehension of law may be recovered.

VIII.

Apparent recognition of illegal pledge by receiver not binding on creditors of bank.

IX.

A ratable distribution of this bank's assets should be had but would be impossible were these illegal pledges upheld.

BRIEF AND ARGUMENT

Error

1. The judgment of the court below is contrary to law.

2. The court below erred in finding that the plaintiff, Santa Cruz County, is the owner and holder of a pledge lien upon the following described bonds, the property of the receiver of said The Nogales National Bank, to-wit:

> Twenty-one (21) City of Nogales Waterworks Improvement bonds issued by the City of Nogales, a municipal corporation in the State of Arizona, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twenty-three (23) to forty-three (43), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent per annum payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each;
>
> ALSO, nine (9) City of Nogales Sewage Disposal bonds issued by said City of Nogales, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twelve (12) to twenty (20), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent per annum, payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each.

3. The court below erred in ordering, adjudging and decreeing that the amount of Five Thousand Nine

Hundred Sixty-eight and 25/100 ($5,968.25) Dollars (or any other amount) is secured by a pledge lien upon all of said bonds and coupons, and said lien is hereby foreclosed; that a special execution shall issue as provided by law and the rules of this court, directing the marshal to sell said bonds and coupons, or so much thereof as may be necessary to satisfy said sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars with costs, and accruing costs as under execution, and that proceeds of sale thereof be applied on said amount so due plaintiff, with costs and accruing costs.

4. The court below erred in not finding that fifteen (15) certain bonds of the County of Pima School District No. 1, school building bonds bearing five (5%) per cent interest due March 1, 1939, with coupons attached, numbers 17 to 31 inclusive, of the par value of One Thousand ($1,000.00) Dollars each or the proceeds thereof, the sum of Fourteen Thousand Two Hundred Fifty-seven and 16/100 ($14,257.16) Dollars, are the property of the said The Nogales National Bank and in not ordering, adjudging and decreeing that such bonds or the said proceeds thereof delivered to this defendant as receiver aforesaid.

5. The court below erred in not finding that the said twenty-one (21) City of Nogales Waterworks bonds together with coupons attached and interest on the said bonds heretofore collected by the plaintiff, Santa Cruz County, its officers and agents, and the said

nine (9) City of Nogales Sewage bonds, together with coupons attached and interest on the said bonds heretofore collected by the plaintiff, Santa Cruz County, its officers and agents, are the property of the said The Nogales National Bank and in not ordering, adjudging and decreeing that such bonds, coupons, and interest so collected, be delivered to this defendant as receiver aforesaid.

Prior to the Passage of the Amendment to the National Bank Act on June 25, 1930, National Banks in Arizona Were Utterly Without Power to Pledge Their Assets to Secure Deposits of Funds of a State or Political Subdivision Thereof, and Any Such Attempted Pledges Were Utterly Illegal and Void. The Passage of the Amendment Did Not Validate Pledges as to Deposits Made Prior to June 25, 1930, Unless There Was a Repledging of the Securities or Redepositing of the Funds, Neither of Which Occurred in the Instant Case.

1. The Act of June 25, 1930, C604, 46 Stat. 809 (12 U. S. C. A. No. 90) amends Section 45 of the National Bank Act of 1864 by adding thereto, the following:

> 2. "Any association may, upon the deposit with it of public money of a state of any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located

in the case of other banking institutions in the State."

3. In the instant case the deposit in escrow, presumably as an attempted pledge, of the Pima County School bonds, Nogales Waterworks bonds and Nogales Sewage bonds, was made during the months of March and June of 1928, over two years prior to the passage of the amendment and at a time when the bank had absolutely no right to make such a pledge.

4. The last deposit of county funds in the bank bringing the amount of the deposit up to $50,000.00, was made during the month of May, 1928, and no deposit of monies or credits of any kind or description was made subsequent to June 1, 1928, more than two years prior to the passage of the 1930 amendment.

5. It may be said without fear of a contradiction that prior to the passage of this amendment, on June 25, 1930, National Banks could not legally pledge assets to secure deposits of public funds of a state or a political subdivision thereof. The Supreme Court definitely settled and closed that question.

6. In the case of Marion v. Sneeden, 291 U. S. 262, 268, 78 L. Ed. 787, the court said:

> "A National Bank could not legally pledge assets to secure funds of a State or a political subdivision thereof prior to the 1930 Amendment, and since then it can do so legally only if it is located in a State in which State banks are so authorized. In some States National Banks had prior to the 1930 Amendment frequently pledged assets to se-

> cure public deposits of a State or of a political subdivision thereof. Comptrollers of the Currency knew that this was being done and they assumed that the Banks had the power so to do, but the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

From the foregoing statement and from the cases hereinafter quoted, it definitely appears that any pledge of assets by a national bank prior to June 25, 1930, to secure deposits of either public or private funds is, without reservation or exception, positively illegal and void.

Texas & Pac. Ry. v. Pottorf, 291 U. S. 245, 78 L. Ed. 777;

Lewis v. Fidelity & Deposit Co. of Maryland, 292 U. S. 559, 78 L. Ed. 1425;

O'Connor v. Rhodes, 79 F. (2d) 147, 152;

Baldwin, Rec. v. Chase Nat'l. Bank, Opinion filed August, 1936, Northern Dist. New York;

Mays v. Wilkinson, 12 Fed. Supp. 350;

Ross v. Lee, 15 F. Supp. 972;

Faircloth v. Atlantic, 16 F. Supp. 131.

The trial court in its memorandum decision quoted Capital Savings & Loan Association v. Olympia Nat'l. Bank, 80 Fed. (2) 561, as follows:

> "The plain purpose of the amendment was to remove any doubt of the *power* of National Banks to give security for public deposits, and in that

respect to enable them to invite public deposits on an equal footing with State Banks."

Yet this cannot be correct for the Supreme Court of the United States has said in Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 258:

> "This amendment indicates that Congress believes that the original act had not granted general power to pledge assets to secure deposits. The fact that the amendment was made to Section 45 indicates that the power to pledge was granted only as an incident of the public officers duty to demand a pledge. If, as is suggested, the 1930 Amendment was passed merely in order to settle doubts as to the power of a National Bank to pledge its assets to secure deposits, the amendment would have been made, not to Section 45 but to Section 8 which contains the grant of incidental powers."

Senator Thomas, in introducing the bill, stated in the Senate:

> "It is a bill simply to confer on a National Bank the same opportunity for the giving of security for the safe keeping and prompt payment of State and County moneys, as is authorized with reference to State banking institutions." 72 Cong. Record 6243. It was an entirely new grant of power.

The Passage of the Amendment Did Not Validate Pledges as to Deposits Made Prior to June 25, 1930, Unless There Was a Repledging of Securities Sought to be Recovered or Redepositing of the Funds.

The trial court continuing said, "Upon the passage of the amendment The Nogales Natl. Bank was empowered to pledge its security and to ratify an executory or continuing pledge, previously beyond its power. It was not necessary to go through the formality of executing a new pledge." (Quoting Lewis v. Fidelity & D. Co., 292 U. S. 559.) But the circumstances are decidedly different.

In the Lewis case there was a bond to secure deposits, a four year bond commencing in 1928. This was a definite agreement to run four years. In the case at bar the attempted pledge was made in March and June of 1928 for no definite term. It could have been terminated in a day or week.

In the Lewis case all of the funds were withdrawn from the bank after the passage of the amendment and subsequently redeposited. They were thereafter added to and checked upon. The withdrawal and redepositing, after the passage of the amendment, of the entire deposit was obviously a new agreement. In the case at bar not one cent was withdrawn nor one added to the deposit subsequent to June 1, 1928. In the Lewis case the Supreme Court refused to pass on the question of deposits made prior to the passage of the amendment.

In the Lewis case there was a general lien to enforce the bond. The lien was created by law as an incident of the bond, and is vastly different from a lien sought to be established as a result of an illegal and *ultra vires* pledge of specific securities to secure a deposit of moneys made wholly before the passage of the amendment. The trial court quoted Ross v. Knott, 13 Fed. Supp. 963, a district court case from the Northern District of Florida. In this case the Florida judge stated that this particular case presented a question quite similar to that in the Lewis v. Fidelity (supra). Yet such obviously was not the case. The Supreme Court of the United States refused to pass on the question so quickly decided by the Florida district judge.

The court below cited the Lewis case as authority for the statement:

> "The appointment of the depository was within the power of the State to confer and the bank to accept, but by reason of the paramount Federal Law the pledge could not arise. When that obstacle was removed by the amendment the original agreement could as to the future have full effect."

This was a condensation of the paragraph that in my opinion overlooked the all important qualification included in that paragraph. For the Supreme Court said:

> "When that obstacle was removed by the Act of June 25, 1930, the original agreement could *as*

> *to the future* be given the effect intended by the parties; and *the lien became operative as to deposits thereafter made* and is entitled to priority from the date of the Act." (Italics mine.)

The distinction is significant. And a few lines thereafter the Supreme Court expressly disclaimed any opinion as to deposits made before the enabling act when it said:

> "We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date."

To Hold That the Passage of the Amendment Validated an Illegal and Ultra Vires Pledge as to Deposits Made Prior to June 25, 1930, Is to Give the Amendment a Retroactive Operation.

No Law Should be Given a Retroactive or Retrospective Operation Unless Such Intention of the Legislature Is Plainly Expressed in the Law.

In the case now under consideration the decision appealed from was based squarely upon the proposition that the amendment validated a pledge made prior to June 25, 1930, as to deposits made prior to June 25, 1930.

The securities sought to be recovered were put up in escrow two years before the passage of the amendment and the funds intended to be secured thereby also were deposited years before the passage of the

amendment. Any construction of the amendment which relates back and gives to these transactions some different legal effect from what they had under the law when these transactions occurred render the statute retrospective in its operation. The construction applied by the court below would create a cause of action where none existed before. "A retrospective statute is regarded with disfavor." "A statute will not be given a retroactive construction unless it is distinctly expressed or clearly and reasonably implied that the statute is to have such retroactive effect." There is nothing on the face of the statute from which it can be inferred that this statute should be construed retroactively.

Ross v. Lee, 15 Fed. Supp. 972.

The general rule as to prospective and retrospective operation of statutes is set forth in 25 R. C. L. 785, as follows:

> "A retrospective law, in the legal sense, is one which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. It may also be defined as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates back to and gives to a previous transaction some different legal effect from that which it had under

the law when it occurred. A retrospective law may be further defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inhereint in their nature, in view of the law in force at the time of their occurrence."

In 25 R. C. L., page 786, it is said:

"Purely retrospective laws involve the exercise of judicial rather than strictly legislative power. Operating not only on future rights and liabilities but also on matters that occurred, or rights and liabilities that existed, before the time of enactment, they pronounce judgment on what was done before their enactment. Every law that takes away or impairs rights that have vested under existing laws is generally unjust and may be oppressive. Hence, such laws have always been looked on with disfavor. It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation (*nova constitutio futuris formam imponere debet non praeteritis*). The objection to retroactive legislation has also been expressed in the maxim, *Leges quae retrospiciunt raro, et magna cum cautione sunt adhibendae neque enim Janus locatur in legibus,* 'laws which are retrospective are rarely and cautiously received, for Janus has really no place in the laws.' The American constitutions of many of the states contain no provisions directly forbidding retrospective laws, such laws are void if they impair the obligation of contracts or vested rights. Even

though the legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored, and such effect will not be given unless it is distinctly expressed or clearly and necessarily implied that the statute is to have a retroactive effect. There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common-law right, or the effect of giving it retroactive operation will be to destroy a vested right, or to render the statute unconstitutional. The postponement of the time when a statute shall become effective evidences an intent to make it of retrospective operation. It has been declared that, in the absence of express words to that effect, a law can operate only upon future, and not upon past transactions. But this is too broad a statement of the rule. The intention of the legislature controls, and if it is unmistakable that an act was intended to operate retrospectively that intention must be given effect, even though it is not disclosed by express words, and even though the law, thus construed, must be declared to be invalid."

In the case of Harvey v. Tyler, 2 Wallace 328, 17 L. Ed. 871, the court holds:

> "All statutes are to be considered prospective unless their language is expressed to the contrary or there is a necessary implication to that effect."

In the case of United States v. Union Pac. Ry., 98 U. S. 569, 25 L. Ed. 143, it is held:

> "It will not be presumed unless the language of the statute imperatively requires it that Congress intended by a retrospective law to create new rights in one party at the expense of the rights of other parties, or that where no right of action existed Congress intended to create a right of action founded on past transaction."

In U. S. Fidelity & Guaranty Co. v. United States, 209 U. S. 306, 52 L. Ed. 804, it is held:

> "A statute will be presumed not to have meant to act retroactively and should never receive such construction if it is susceptible of any other or unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied."

In the case of City Railroad v. Citizens Street Railway Co., 166 U. S. 557, 41 L. Ed. 1114, it is held:

> "A statute should not be construed to act retrospectively or to affect contracts entered into prior to its passage unless its language be so clear as to admit of no other construction."

In Schwab v. Doyle, 66 L. Ed. 747, 258 U. S. 528, it is held:

> "Laws are not to be considered as applying to cases which arose before their enaction unless that intent be clearly declared."

The court below regarding this as a case similar to that of Ross v. Knott (supra) from the northern district of Florida seemingly has relied on the reasoning put forth in that opinion. The Florida judge quoted with approval the language in the case of Lewis, Receiver v. Fidelity & Deposit Company of Maryland (supra):

> "A statute is not retroactive merely because it draws upon antecedent facts for its operation."

The lower court evidently construed this language to mean that it would not render the Amendment retroactive to apply it to deposits under a pledge agreement when both the pledge and the deposits thereunder were made prior to the operative date of the Amendment. It would seem that what the Supreme Court meant is, that it would not render the Amendment retroactive to apply it to *deposits that were made after the operative date of the Amendment for the unexpired period of a continuing pledge agreement executed prior to the operative date of the Amendment.* (Italics mine.)

The antecedent facts to which reference was made by the Supreme Court were the fact of the existence of an unexpired continuing pledge made before the operative date of the Amendment that extended for a period beyond the operative date of the Amendment

and the fact of the delivery of a bond prior to the operative date of the Amendment in pursuance of the pledge, as distinguished from the fact that the deposits were made prior to the operative date of the pledge. The court held in effect that as the pledge agreement had not by its terms expired when the Amendment that authorized the same became operative and as a bond had been delivered pursuant to the pledge prior to the operative date of the Amendment, that the application of the Amendment to deposits in pursuance of the pledge made after the operative date of the Amendment did not render the application of the Amendment retroactive as to deposits made during the unexpired period of the pledge. In other words, the application of the statute to deposits that were made prior to June 25, 1930, under a continuing pledge agreement and bond that were likewise made prior to June 25, 1930, would give the statute a retroactive operation; whereas, the application of the statute to deposits that were made subsequent to June 25, 1930, under the unexpired period of a continuing pledge agreement which was made prior to June 25, 1930, the collateral in pursuance of the pledge having been delivered prior to the operative date of the Amendment, would not give the statute a retroactive application because the statute would draw upon the hereinbefore enumerated antecedent facts for its operation. All of the deposits in the case now before the court, however, were made prior to June 25, 1930, and the col-

lateral sought to be recovered also having been pledged prior to June 25, 1930; to apply the statute to deposits made prior to the operative date of the Amendment under a pledge agreement which was made prior to the operative date of the Amendment, the pledged collateral having also been delivered prior to the operative date of the Amendment, would render the statute retroactive in its application.

In the case of Columbus Spar v. Starr, 214 N. Y. Supp. 652, the Supreme Court of New York quotes with approval the rules of statutory construction as to a retroactive effect as such rule is set forth in Johnson v. United States, 17 Court of Claims, page 171, as follows:

> "A statute does not operate retrospectively when it is made to apply to *future transactions,* merely because those transactions have relation to and are founded upon antecedent events."

As to the Amendment of June 25, 1930, any other construction than the one for which appellant contends would have the effect of bringing into existence a new obligation thereby impairing vested rights.

Retroactive legislation is not favored. A statute will be given retroactive effect only when Congressional intent to that end clearly appears and the language used imperatively requires it.

Cameron v. U. S., 231 U. S. 710;
U. S. v. Union Pac. Ry. (supra);
White v. U. S., 191 U. S. 545;
U. S. F. & G. Co. v. U. S. (supra).

The court below took the position that:

> "The retention of the deposit by the Bank and the holding of the security intended to secure the former, for seventeen months after the Bank was authorized to enter into just such a transaction as this, constituted a ratification of the delivery of the securities for the purposes intended by the parties of securing the deposits left by the County on the Nogales Bank."

A Contract Beyond the Power of a Corporation to Make Cannot be Made Valid by Confirmation, Ratification or Estoppel.

There Could be no Ratification of a Pledge Made With Respect to Money Deposited in the Bank Prior to the Date of the Enabling Act Under a Pledge Agreement Which the Bank Was Without Power to Execute, Made Prior to the Date of the Enabling Act, Either by the Act of the Bank or by Change of the Law in Force When the Transactions Were Consummated.

Prior to the enabling Act of June 25, 1930, the Bank was without power to pledge assets; the pledge of assets was beyond the powers conferred by Congress. A contract not within the scope of the powers conferred on the corporation cannot be made valid by subsequent ratification or part performance and a transaction originally unlawful cannot be made any better by ratification since existing statutes enter into the terms of a contract by implication.

The law in force at the time a transaction is consummated determines its validity.

In Memphis Railroad v. Commissioners, 112 U. S. 623, 28 L. Ed. 842, the Supreme Court holds:

> "It is, of course, the law in force at the time the transaction is consummated and made effectual that must be looked to as determining its validity and effect."

In the case of Schaun v. Brandt, 116 Md. 560, 82 Atl. 554, it is held:

> "If the law in force in 1908 did not give the company the power to purchase its stock, and the contract was, therefore, illegal the Act of 1909 did not change the character of that contract. The validity of an agreement depends upon the law existing at the time that it is made. In the case of Stewart v. Thayer, 47 N. E. 420, where the contract was entered into in 1893 and was held to be contrary to the existing law of Massachusetts which was changed by the Statute of 1894, the court held that 'the validity of the contract must be determined by the law as it existed in 1893'."

In the case of Chas. H. Steefey v. Bridges, 117 Atl. 887 (Md.), it is held:

> "Where a property owner contracted to pay a real estate agent a commission for securing a tenant for certain property, and a lease was made to the United States Post Office Department during the time when under postal laws and regulations No. 56½ a contract entered into by the Post Office Department must contain a covenant that the con-

tractor had not employed a third person to solicit or obtain the contract in his behalf, and all money payable to the contractor was free from obligation to pay any person for services rendered in the procurement thereof, a commission for securing a contract could not be collected regardless of the fact that amendments adopted subsequently to the contract would permit commissions to be paid to *bona fide* established real estate agents for securing such contracts."

In the case of International Products Company v. Vail's Estate, 123 Atl. 194 (Md.), it is held that:

"If agreement for payment of underwriting commissions in corporate stock was invalid when made, under Maryland laws, it cannot be validated by a law in force thereafter."

In People v. Nixon, 128 N. E. 245 (N. Y.), it is held:

"That the obligation of a contract is determined by the law in force when it is made, since existing statutes entered into the terms of a contract by implication."

In Anthony v. Household Sewing Machine Company, 5 L. R. A. 575 (R. I.), the holding of the court is condensed into the first and second headnotes as follows:

"1. Money loaned to a corporation to be repaid in preferred stock to be subsequently issued, may be recovered back where the corporation had at the time of the loan no power to issue such stock,

although the power to issue such stock has been granted to the corporation before the trial of the action."

"2. A contract by a corporation to repay a loan in preferred stock which it had no authority to issue is a nullity, and is not renewed by a subsequent Act authorizing it to issue a preferred stock, but which does not empower it to renew that contract."

"It would be a contradiction in terms to assert that there was a total want of power by an act to assume the liability and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified."

California Nat. Bank v. Kennedy, 167 U. S. 362, 271, 17 S. Ct. Rep. 831, 834.

Kavanaugh v. Fash, 74 F. (2) 435, referred to in the trial court's memorandum decision as relied upon by counsel for plaintiff and appellee, is far wide of the mark. It did pass on the question of deposits made after the passage of the amendment, but not before, and in that case there had been a repledging of the bonds, sought to be recovered, after the passage of the amendment. This case was disposed of on the pleadings when the answer revealed that fact.

Bearing in mind the facts that delivery of the securities sought to be recovered and the last of the deposits in the case at bar were made two years prior to the passage of the amendment and that the transac-

tion could have been terminated at any time within those two years, how can it be said that the passage of the amendment validated a pledge utterly beyond the power of the bank to make?

In the case of McDougald v. New York Life, 146 Fed. 678, the Circuit Court of Appeals of the Ninth Circuit quotes with approval the rule of interpretation of Amendments as set forth in Black on Interpretations, when the court said:

> "The Act of 1897 went into effect April 7, 1897, and the default in payment of premiums due occurred June 30, 1897. The general rule which we deem applicable to the present case is clearly stated in Black on Interpretation of Laws (Section 133, pp. 359, 360), as follows:
>
> " 'When an amendatory act provides that the original statute shall be amended "so as to read as follows," and thereupon, repeats some of the clauses or provisions of the amended statute and omits others, and at the same time introduces certain new clauses or sections, there are three points which must be chiefly noticed in regard to its operation and effect. In the first place, as to those portions of the original statute which the amendatory act simply retains, it is not generally to be construed as a new enactment. It does not repeal those provisions and then reenact them in the same terms, but they are to be considered as remaining in force from the time of the original enactment, and as being merely continued in operation by the amendatory statute. . . . In the second place, those provisions which are newly

> added by the amendatory statute are not to be considered as having been in force from the beginning. They take effect from the time of the enactment of the amendatory act, and derive their whole efficacy and vitality from the amending law, and not from that amended. . . . In the third place, all those provisions of the original statute which are not repeated in the amending statute are abrogated or repealed thereby, and are, thereafter, of no force or effect whatever.'—Citing Ely v. Holton, 15 N. Y. 595, Moore v. Mausert, 49 N. Y. 332, and numerous other cases."

The Supreme Court has held repeatedly that a contract not within the scope of the powers conferred on the corporation cannot be made valid by a subsequent ratification nor part performance or that a transaction originally unlawful, cannot be made any better by ratification.

California Natl. Bank v. Kennedy (supra).

In this case was involved the question of the power of a National Bank to acquire the stock of a Savings Bank not taken as security or acquired in the course of the business of banking; the court in this last-cited case held:

> "The transfer of the stock in question to the bank being unauthorized by law, does the fact that under some circumstances the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of Thomas v. West Jersey R. Co., 101 U. S. 71; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 371; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24; St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393; Union P. R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564; and McCormick v. Market Nat. Bank, 165 U. S. 538—recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in Central Transp. Co. v. Pullman's Palace Car Co. (supra):

" 'A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

"This language was also cited and expressly approved in Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 524, 530.

"As said in McCormick v. Market Nat. Bank, 165 U. S. 538, 550:

" 'The doctrine of *ultra vires,* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law.' "

Continuing, the court in this last-cited case holds:

"The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. National Bank v. Whitney, 103 U. S. 99; Union Nat. Bank v. Matthews, 98 U. S. 621. The difference between those cases and one like this was referred to in McCormick v. Market Nat. Bank (supra), and it is, therefore, unnecessary to particularly review them. The claim that the

bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified. As was said by this court in Union P. Ry. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, speaking through Mr. Chief Justice Fuller (p. 581):

"'A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel.'"

In the case of Westerlund v. Black Bear Mining Co., 203 Fed. 612, it is held by the Circuit Court of Appeals of the Eighth Circuit:

"Another principle of law so firmly established as to be no longer debatable is that an act or contract of a corporation which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it. But an act or contract of a corporation which is neither wrong in itself nor against public

policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a third party or parties, is voidable only. Such an act or contract is valid until avoided, not void until validated, and it is subject to ratification and estoppel."

Obviously the attempted pledge was not within the corporate powers of the bank and as such is utterly void.

In the case of Texas Ry. v. Pottorf (supra) it is held:

"The Receiver is not estopped to deny the validity of the pledges. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed, and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. It is the duty of the Receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for distribution for the general creditors, even though the corporation itself was not in a position to do so."

The obligation of an *ultra vires* contract is void whether executed or executory.

Metropolitan Trust Co. v. McKinnon, 172 Fed. 846.

Restitution Is Not Necessary. The Receiver May Recover Securities Unlawfully Pledged Without Making Restitution to Pledgee.

"Since the Herrin Bank was without power to make the pledge of bonds herein in question, its Receiver is entitled to recover them unconditionally in order that they may be administered for the benefit of the general creditors of the bank."

Marion v. Sneeden, 291 U. S. 262, 54 S. Ct. 421, 423.

"The Receiver may assert the invalidity of the pledge *without making* restitution by paying the pledgee's claim in full. The railway's argument to the contrary is that when as a result of an *ultra vires* contract one of the parties is enriched at the expense of the other, the law creates an obligation to repay *ex aequo et bono* (in justice and fairness) to the extent of the enrichment. The argument, if applicable, would not help the railway. Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable res and a constructive trust based on special circumstances of misconduct, prefer a preference over the other creditors. The pledge here challenged having failed because illegal, the railway is entitled only to a dividend as a general creditor. Its right thereto is conceded."

Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 261, 262.

Obviously there is no identifiable res in the case of money deposited in a bank.

Blakely v. Brinson, 286 U. S. 254, 52 S. Ct. 516, 517.

In the case of People ex rel. Nelson v. Wiersema State Bank, 197 N. E. 537, 101 A. L. R. 514, wherein was involved the right of a receiver to recover assets which were illegally pledged, the court said:

> "One question remains to be considered. Appellant contends that even though this court should hold the contract and pledge to be *ultra vires* and void, it should not be required to surrender the assets except on condition that the receiver first pay to it the amount of its deposit at the time the bank ceased to do business. There is some authority in support of that proposition. State Bank of Commerce of Brockport v. Stone, supra, which is followed by an intermediate court in State v. Dean, 47 Ohio App. 558, 192 N. E. 278. But the weight of authority is against the contention. Divide County v. Baird, supra; City of Marion v. Sneeden, supra; Texas & Pac. R. R. Co. v. Pottorf, supra; Farmers' & Merchants' State Bank v. Consolidated School District, supra. There is a wide distinction between the effect of the exercise of a power not conferred upon a corporation and the abuse of a power granted or a failure to observe prescribed formalities or regulations. Durkee v. People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340. In this state it is well settled that when a contract of a corporation is *ultra vires,* that is to say, outside the object of its creation as defined by the law of its organization and therefore beyond the powers conferred by the

Legislature, it is not only voidable but wholly void, and of no legal effect. It cannot be ratified because it could not have been legally made. No performance by the parties can give it validity or become the foundation of any right of action upon it. Neither party is estopped by assenting to it or by acting upon it to show that it was prohibited. The power in controversy having been withheld, its exercise was thereby prohibited. The powers delegated by the state to corporations are matters of public law, of which no one can plead ignorance. Parties dealing with them are chargeable with notice of those powers and their limitations. A contract void because prohibited by law cannot in any manner be enforced. The law does not prohibit and also enforce a contract. Knass v. Madison and Kedzie State Bank, supra. Restitution would simply continue the wrong against innocent parties. Being bound to take notice of its illegality, appellant had no right to rely on a preference by the unlawful pledging of assets."

In the recent case of Baldwin, Receiver, v. Chase National Bank, decided by Judge Knox of the United States District Court of the Northern District of New York, not yet reported in the Federal Supplement, was involved the right of the Receiver of the Commercial National Bank to impress a trust upon the proceeds then on deposit in the Chase National Bank of the sale of bonds that had been pledged by the Commercial Bank with the War Department to secure

funds deposited in this bank by the Secretary of War, acting for the Government of the Philippine Islands. There was no statute of Congress authorizing the pledge. The court sustained the right of the Receiver to impress a trust in the funds derived from the sales of the illegally pledged securities with the trustee. The Bank in opposing the claim of the Receiver relied upon the rule of decision in the National Bank of Xenia v. Stewart, 107 U. S. 676; in holding the Xenia case inapplicable, Judge Knox points out the distinction between a voidable transaction that can be ratified and a void transaction which is immune from ratification in holding as follows:

> "In cases involving transactions with National Banks *ultra vires* the power of the bank, a distinction between the ability of the bank and the ability of the other party to the transaction to set up its *ultra vires* character has evolved. Compare Kerfoot v. Farmers & Merchants Bank, 218 U. S. 281, and National Bank of Xenia v. Stewart, supra, with California Bank v. Kennedy (supra), and McCormick v. Market Bank (supra).
>
> "That the original attempt to effectuate a pledge was *ultra vires* is now indisputably settled by Texas & Pacific Ry. v. Pottorf (supra), and City of Marion v. Sneeden (supra). In Texas & Pacific Ry. v. Pottorf, Mr. Justice Brandeis said:
>
> " 'National Banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied.
>
> . . .

"'. . . The Railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. The bank itself could have set aside this transaction. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. California Bank v. Kennedy, supra; McCormick v. Market Bank (supra); Central Transportation Co. v. Pullman Co. (supra). But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. . . .

"'The Receiver may assert the invalidity of the pledge without making restitution by paying the pledgee's claim in full. The Railway's argument to the contrary is that when as a result of an *ultra vires* contract one of the parties is enriched at the expense of the other, the law creates an obligation to repay *ex aequo et bono* to the extent of the enrichment. The argument if applicable would not help the Railway. Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable res and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because

illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded.' "

Federal Courts Hold That Assets of a National Bank That Have Been Illegally Paid Out or Disposed of Under a Misapprehension of Law May be Recovered.

That the receiver apparently acquiesced in the detention by the treasurer of Santa Cruz County of the bonds illegally pledged, interest collected from them, and the principal of bonds sold by the treasurer, under a misapprehension of law, will not prevent a recovery of the same.

In the case of O'Connor v. Rhodes, 79 F. (2d) 147, it appears that the plaintiff was creditor of the Commercial National Bank which was found to be insolvent. The bank had undertaken to pledge assets to secure deposits made by the Alien Property Custodian and by the Fleet Corporation. The funds were not property secured by a pledge made to the Secretary of the Treasury under provisions contained in U. S. R. S. 5153 (Title 12, U. S. C. A., Section 90). The Attorney-General succeeded to the powers of Alien Property Custodian. The Comptroller and Receiver recognized the validity of these pledges and paid the claims of the Fleet Corporation and the Alien Property Custodian in full upon the theory that the pledges were legal. The plaintiff general creditor contended that there was

"'. . . The Railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. The bank itself could have set aside this transaction. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. California Bank v. Kennedy, supra; McCormick v. Market Bank (supra); Central Transportation Co. v. Pullman Co. (supra). But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. . . .

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no statute which empowered National Banks to pledge their assets to secure the deposits of either the Alien Property Custodian or the Fleet Corporation and the plaintiff filed a bill to require the restoration of the funds claimed to have been preferentially paid by the Receiver of the Bank. The court held the pledges were illegal and decreed a restoration of the funds thus illegally paid out by the Receiver.

Stockholders and Creditors Are Not Bound by Any Act of the Receiver in Apparently Ratifying and Confirming Pledges, as Rights of All Creditors Become Fixed as of Date of Closing. No Act of Receiver Can Transform an Unsecured Claim Into a Secured Claim.

While no point was made in the lower court on the Receiver's apparent recognition of the illegal pledges, it may be proper to discuss that question. It appears that for many years the Comptroller of the Currency permitted National Banks to pledge assets to secure deposits of public funds. Comptrollers knew that this was being done and assumed that it was legal until the decisions of Texas Ry. v. Pottorf, supra, Lewis v. Fidelity & Deposit Co. of Maryland (supra), and Marion v. Sneeden (supra), decided in 1934. These cases were decided several years after the appointment of the Receiver of the Nogales National Bank. In those cases above named it was held that the fact that the Comptroller of the Currency had recognized the valid

ity of illegal pledges made prior to June 25, 1930, did not have the effect of ratifying or validating the same. It would seem therefore that the apparent recognition by the receiver in this case of the pledges involved can not be held to have had the effect of ratifying or confirming them and of transforming the claim from the class of unsecured claims to secured claims. In Texas Ry. v. Pottorf, supra, the Supreme Court of the United States said:

> "The Receiver is not estopped to deny the validity of the pledges. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed, and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. It is the duty of the Receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for distribution for the general creditors, even though the corporation itself was not in a position to do so."

Sections 5236 R. S. U. S.—Title 12 U. S. C. A. 194 and 5242 R. S. U. S.—Title 12 U. S. C. A. 91 very clearly prohibit the preference of one creditor over another and require a ratable distribution for all creditors:

> "DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS.
>
> From time to time, after full provision has been first made for refunding to the United States

any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." (R. S. 5236, Title 12, U. S. C. A. 194.)

"TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment

in any suit, action or proceeding in any State, county, or municipal court." (R. S. 5242, Title 12, U. S. C. A. 91.)

The Receiver has ample statutory authority to sustain an action to recover excessive payments over and above the amount the depositor is entitled to receive as an unsecured creditor of the bank. The distribution is to be ratable on the claims as proved or adjudicated. That is, according to one rule of proportion applicable to all alike.

National Bank of Selma v. Colby, 21 Wallace 609, 22 U. S. Law Ed. 786;

Scott v. Armstrong, 146 U. S. 499, 36 Law Ed. 1059;

Merrill v. National Bank of Jacksonville, 173 U. S. 131, 43 Law Ed. 640.

In the case of Cook County National Bank v. United States, 107 U. S. 445, 448, the Supreme Court said:

"We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed; the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the

manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security and redemption of their notes, the winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

The Case of Wood v. Imperial Irrigation District, 17 Pac. (2d) 132, 216 Cal. 748, Is a Case in Point as to Principle Which Sustains All Appellant's Contentions.

In the case of Wood v. Imperial Irrigation District, 17 Pac. (2d) 132, 216 Cal. 748, appears to involve all the principles now before the court, and fully sustains all of appellant's contentions. It will be observed that at the time of making the pledge in the Wood case, the Supreme Court of California found that the Bank was without corporate power to pledge is assets in order to secure deposits of an irrigation district; subsequently to the time of the attempted pledge, but prior to the date of closing the bank, the State Legislature passed an act which would make it lawful for a State Bank to pledge its assets to secure such deposits. The deposits attempted to be secured were deposits made prior to the effective date of the amended

act enlarging the corporate powers of the State Bank. The court held that the deposits made prior to the amendatory legislation were not secured by the pledge, nor was the pledge vitalized by the mere passing of an enabling act without repledging of securities to secure deposits made prior to the passing of the enabling act. The court fully sustained the contentions of the appellant; that an illegal agreement to pledge assets was not validated by the adopted enabling act; that a contract void as stipulating for doing what law prohibits, cannot be ratified; that the recognition of a contract to do an act, prohibited by law when contract was executed, after such act becomes legal, does not constitute ratification of the contract; that a contract doing what the law prohibits does not create an estoppel; that statutes authorizing banks to pledge their assets as security for deposits must be strictly construed and nothing left to implication or doubtful construction; that the general policy of the law will not sanction the pledge of banks' assets as security for deposits in the absence of clear statutory; that innocent depositors' rights must be protected as against an illegal pledge of assets.

The Supreme Court of California in this last-cited case of Wood v. Imperial Irrigation District, 17 Pac. (2d) 132, and following pages, holds:

> "We are of the view that the contract or agreement to pledge the bank's assets as security for the deposit made June 19, 1925, was illegal as an original transaction, being in contravention of

Section 21 of the Bank Act (as amended by St., 1913, p. 147) which declares that 'the capital and assets of any such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders.' See, also, Section 27 of the Bank Act (as amended by St., 1913, p. 151). The only manner in which the priority of one depositor may be secondary to the right of another depositor is by statutory enactment, which does not exist in favor of appellant under the law as it existed when it made its said deposits. The contract was not validated by the adoption of the act of July 29, 1927. At the time said money were deposited with the bank they became a part of the common fund of the commercial department of said bank, subject to the same risks as the moneys of all other persons who made deposits in said commercial department. The relationship of debtor and creditor was created. Prior to the security transaction herein appellant had actually made deposits with said bank for which no security was taken. No attempt was made to reaffirm, ratify, or bring the transaction within the purview of the act which became a law some two months and twelve days before the bank was taken over by the superintendent of banks and no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or preferred deposits. The funds had long since been disbured through the commercial department as other depositors' funds had been disbursed. They were not then in the bank.

No deposits were made within the time in which the irrigation district was entitled to receive security for deposits, and only those bodies which made deposits and took security therefor under the express sanction of existing law were entitled to enjoy the extraordinary privilege provided by statute. A contract void because it stipulates for doing what the law prohibits is incapable of being ratified. *The recognition of the contract for a long period after the act becomes legal does not constitute a ratification of the contract.* (Italics mine.) Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; Stevens v. Boyes Hot Springs Co., 113 Cal. App. 479, 298 P. 508; Robinson v. Contra Costa, Etc., Ass'n, 112 Cal. App. 252, 296 P. 922; Biggart v. Lewis, 183 Cal. 660, 671, 192 Pac. 437; Colby v. Title Ins. Co., 160 Cal. 632, 117 Pac. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515. Neither does such a contract create an estoppel. Hedges v. Frink, 174 Cal. 552, 555, 163 P. 884; Colby v. Title Ins. & Tr. Co., supra; Tate v. Commercial Bldg. Ass'n, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 772.

"The act which became effective July 29, 1927, and which specifically authorizes irrigation districts to receive securities for deposit of their funds made with banks, does not purport to be a curative or remedial act, or to operate under any circumstances retroactively. Even where there is no prohibitory statute, it is held that an agreement to give security for county deposits is *ultra vires* and unlawful. Statutes adopted with

a view of authorizing banks to pledge their assets to depositors as security therefor must be strictly construed, and nothing should be left to implication or doubtful construction. In the absence of clear statutory provisions authorizing such pledging of assets, the general policy of the law will not sanction it. The reason of the rule is briefly stated by the Idaho Supreme Court in Porter v. Canyon County, etc., Ins. Co., 45 Idaho 522, 263 P. 632, 634, as follows:

" 'It has been held that, even in the absence of a statute prohibiting it, a bank cannot pledge its assets to secure a depositor; such act being "*ultra vires* and void" (citing Divide County v. Baird, 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296, and Commercial Bkg. & T. Co. v. Citizens' Trust & G. Co., 153 Ky. 566, 156 S. W. 160, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915C. 166). The reason underlying these two strong cases may be reduced to the proposition that a bank organized under a statute permitting it to do business on terms and conditions and subject to liabilities prescribed in the statute has no power to pledge its assets to secure a deposit where such power is not expressly awarded by law. . . .

" 'Under the laws of this state, the commissioner stands as a trustee to protect the rights of all claimants, particularly those of depositors and general creditors. Under the law, the right of the defendant can be only that of a general depositor as such; it can acquire no greater right than that inuring to any other general depositor as such.'

"Discussing the question of public policy of securing depositors where there is no express statutory warrant for doing so, the court in Commercial Bank & Trust Co. v. Citizens' Trust & Guaranty Co., 153 Ky. 566, 156 S. W. 160, 163, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915C 166, said:

" 'Large depositors, if secured, might absorb the greater part of the assets of the bank, and inflict loss upon unsecured depositors and financial ruin upon innocent stockholders under the double liability law. The law contemplates, and was evidently framed to insure fair and uniform dealings by the bank with all of their depositors. A secret pledge to secure one, while others are left without security, although it may be without specific intent to defraud, would nevertheless, in case of loss, justify such an inference.

" 'Public policy will not, therefore, tolerate a practice which might, sooner or later in the event of financial trouble with the bank, enable it to pay and protect the favored few at the expense of the equally deserving many. If the fact was known that a bank had secured some one or more of its depositors and left the others unsecured, no prudent person would deposit with it. No bank would advertise that it engaged in such a practice; because depositors, who were not provided for, would be driven away. The very fact that the transaction is one that will not stand the test of publicity is a strong argument against its legality, as well as its necessity. Banks publish statements of their assets, and individuals deposit on the faith of these published statements. It is well

known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits thus induced are nevertheless cut off from sharing in these assets until some unknown favored few, who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits, when its assets were secretly pledged. . . . We are unwilling to hold that a bank, in the absence of some statutory authority, may exercise a right or power which would enable it to perpetrate a fraud upon any of its depositors.'

"Appellant takes the alternative position that the making of the deposits and the giving of the security was either lawful or unlawful. If unlawful, it was unlawful on the part of one party as well as on the part of the other. In other words, if the district could not make the deposit without taking security for such deposit, and the bank was not authorized to give the security, then neither could the deposit be lawfully made nor the security lawfully given; that it was a single transaction, and, if unlawful, both parties are equally at fault, and a trust is immediately created earmarking the particular money which never became the assets of the bank at all, and it must be returned to appellant. We are constrained to hold with the trial court that the deposit was not forbidden by law, but that the giving over of the bonds as security for the deposit was unlawful."

Continuing, the court holds on page 134 of this last cited case as follows:

"Appellant complains somewhat bitterly, and probably not without color of moral justification, and invokes the doctrine of estoppel against said bank based upon the stipulated fact that said bank solicited said deposits, and, had it known that the bank could not have lawfully pledged its bonds, it would not have made the deposits. It is also stipulated that the superintendent of banks was charged with knowledge that the pledged bonds were in possession of the district for more than two years, and he made no complaint as to its possession and claim. The difficulty with this proposition is that the rights of the depositors, innocent third parties, are involved in the transaction, and their protection is one of the first concerns of the law. Their rights are surely equal with those of the district, unless the statute has given a preference to said district, which was an actor in the transaction. If it acted under a mistake of law, its position should not be better than that of other depositors who were ignorant of the bank's approaching insolvency as well as the attempt on the part of the district to secretly secure its deposits.

"From our examination of the various decisions, statutes, and constitutional provisions, we are brought to the conclusion that the deposit of appellant's funds with the bank was not an unlawful or invalid act, but that its right to receive security for its deposit did not find support in law, and, this being so, it must stand upon the same

level with the general depositors; its relation with the bank being that of debtor and creditor."

Assignment of Error II and IV

2. The judgment of the court below is contrary to the agreed statement of facts.

4. The court below erred in finding that said bonds and coupons were pledged by said The Nogales National Bank to plaintiff as security for payment to plaintiff of the public monies and funds of plaintiff on deposit with said The Nogales National Bank, the condition thereof being that said The Nogales National Bank, will promptly pay said public monies to the County Treasurer of said Santa Cruz County upon lawful demand therefor, and will, whenever thereunto required by law, pay to said County Treasurer such monies with interest.

The court below read into the deposit of securities in the National City Bank of New York under a simple escrow receipt containing no specific pledge condition of any kind, the condition of the statutory pledge for Arizona State Banks. (Decree, p. 64 of Record.)

> "That the bonds hereinabove described with the coupons attached thereto were so delivered to said The National City Bank of New York by said The Nogales National Bank as security for payment of the public monies and funds of plaintiff so on deposit with said The Nogales National Bank." (Paragraph VII, p. 74 of Record.)

Assignment of Error No. V

That the court below erred in finding that since the closing and insolvency of said The Nogales National Bank, the sum of Forty-four Thousand One Hundred Ninety-eight and 41/100 ($44,198.41) Dollars has been paid to plaintiff upon said deposit, and that said deposit, secured by said pledge lien upon said bonds, remains unpaid in the sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars.

Dividends were the only payments made to the County by the Receiver. The other sums received were from collection of interest coupons and sale of bonds by the County. Paragraph 12, pp. 75-76, of Record.

The right of the County, as a general creditor, to receive dividends on its claim as any other unsecured creditor of the bank is conceded.

A very recent case from the District Court of Idaho, Southern Division, filed on January 11, 1937, passes squarely upon the principal question involved in our case. This case came to my attention on the day of reading proofs of the brief and too late to be printed in its proper place in the brief. I am accordingly adding it to the printed brief just before the conclusion, the only place where it could be inserted without causing a fatal delay in the printing of the brief and beg the court's indulgence for this violation of the rule.

In the Idaho case the funds involved were deposited prior to the passage of the Act of June 25, 1930, and the pledge of assets also was prior to the Act. In a finding for the Receiver Judge Cavanah quoted the case of Wood v. Imperial Irrigation . . . "deposits made prior to the Amendatory legislation were not secured by the pledge given when the law did not authorize the giving of the pledge, *nor was the pledge vitalized by the mere passing of the new law without repledging the security to secure the deposits made prior to the adoption of the law*" . . . (Italics mine.)

This Idaho case being so squarely in point with our own case the whole opinion is printed in the appendix.

CONCLUSION

It is respectfully submitted that to allow the attempted pledge would be inconsistent with the provisions of the National Bank Act which are designed to insure in case of insolvency uniform treatment of depositors and ratable distribution of assets.

STEPHEN D. MONAHAN,
Attorney for Appellant.

APPENDIX

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

G. D. THOMPSON, Receiver of the Twin Falls National Bank of Twin Falls, Idaho, a defunct National Banking association,		
Plaintiff,	)	No. 1930
vs.	)	
TWIN FALLS HIGHWAY DISTRICT OF TWIN FALLS, COUNTY, STATE OF IDAHO,		
Defendant.	)	

OPINION

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M. J. Sweeley, Twin Falls, Idaho
Everett M. Sweeley, Twin Falls, Idaho
Attorneys for the defendant.

January 11, 1937

CAVANAH, District Judge.

This action is brought by the Receiver of the Twin Falls National Bank against the Twin Falls Highway District to recover the sum of $3,279.09 claimed to have

been illegally paid by R. H. Haas the former Receiver of the bank from the proceeds of the sale of pledged bonds of the bank which had been deposited with the County Auditor on January 19, 1929, to secure the deposits of the District in the bank, made prior to June 25, 1930. The bank was closed and taken charge of by the Comptroller of currency on November 22, 1931. For many years prior to January 19, 1929, it had been a National Banking Association, under the laws of the United States and authorized to do business at Twin Falls, Idaho. The bonds, during the period from the time they were deposited by the County Auditor until the sale on April 27, 1932, remained undisturbed. The Bank did not repledge the bonds as security for any deposits of the district made between January 19, 1929, and June 25, 1930. Subsequently to the making of the pledge various sums of money had been deposited by the District in the bank and of which $4,192.42 had not been withdrawn prior to the closing of it. After June 25, 1930 the District made deposits of its funds in the Bank and when it closed there was the sum of $10,-052.89 of the District's on deposit which included the $4,192.42 deposited prior to June 25, 1930. The District then made a demand on the Receiver for payment of the $10,052.89 and after March 19, 1932, filed a proof of claim with the Receiver which was allowed by him as a secured one, and after that was done the Receiver and the County Auditor, for the purpose of paying the secured claim, caused the pledged assets of the bank to be sold for $12,525.04 and paid from the proceeds of

the sale of the bonds, to the District in payment of its demand and proof of secured claim, the sum of $10,-052.89, and interest of $116.67, under an order of the State District Court, after the filing of a petition by the Receiver for authority.

The facts have been stipulated and they substantially show the above and the account of the District in the bank from January 19, 1929 to November 22, 1931. It shows that the $4,192.42 of the sums deposited prior to June 25, 1930 remained in the account after the closing of the bank. The total amount on deposit in the account of June 25, 1930 was $13,456.86, and after deducting from it the total of all sums withdrawn from the account from that date until the date the bank closed, which was $9,264.44, there remained in the bank the amount of $4,194.42 of the amount deposited prior to June 25, 1930. The officers and directors of the bank knew that the moneys deposited were public moneys and at the time of the closing of it there was sufficient unpledged assets from which to pay in full the account of the District. The Receiver has paid to date, a dividend of twenty-two per cent.

Under the facts thus presented the propositions of law to be considered are:

First; Was the act of the Bank, a National Banking Association, in pledging its assets to secure deposits of public moneys made by the District, in the bank, prior to June 25, 1930, illegal, and if so, were the subsequent acts of the Receiver and the County Auditor taken for the purpose of carrying out the original

pledge in approving and paying the proof of the secured claim of the District, invalid and unlawful?

Second; If the original pledge of the Bank's bonds be illegal could any act of the Bank, after June 25, 1930, constitute a legal ratification of an illegal pledge of the assets of the bank to secure the deposits made prior to that time?

Third; If the original pledge is illegal and the acts taken pursuant thereto could not be legally ratified, were the deposits of the District made in the bank prior to June 25, 1930, trust property held by the Bank for the District, and do the facts give rise to such a trust as will justify or sanction the payments made by the Receiver of the District out of its assets? and,

Fourth, Is the Receiver now barred the relief sought by the reason of the adjudication made by the State District Court of the pledge, sale and disposal of the assets of the Bank?

A national bank prior to June 25, 1930 was not granted authority to legally pledge its assets to secure deposits whether public or private. Act of June 3, 1864, 13 Stat. Section 45, Congress realizing that the original Act of 1864 did not grant such powers, adopted the Act of June 25, 1930 amending the original Act, providing that a National Bank can only do so legally, if it is located in a state in which other banks are so authorized by the State law. The amended Act conferring the additional powers reads: "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give secur-

ity for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the state." 46 St. 908, Title 12 U. S. C. A. Section 90. This construction of the National banking laws has been settled by the Supreme Court and the Ninth Circuit Court of Appeals in Texas & Pacific Railway Co., v. Pottorff Receiver, 291 U. S. 245, 54 S. Ct. 416; City of Marion v. Sneeden Receiver, 291 U. S. 262, 54 S. Ct. 421; Lewis v. Fidelity & Deposit Co., of Maryland, 292 U. S. 559, 54 S. Ct. 848; Utter, District Court Clerk et al. v. Eckerson, 78 Fed. (2) 307.

In the case of City of Marion v. Sneeden, supra, where the question was before the Court is is said: "For the reasons stated in Texas & Pacific Ry. Co., v. Pottorff, decided this day,—we are of the opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits. . . . A national bank could not legally pledge assets to secure funds of a State, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized."

It is obvious that the deposits made prior to June 25, 1930, are the only ones concerned here and as the bank could not then pledge its assets to secure them, the money when then deposited became a part of the common fund of the commercial department of the bank and was subject to the same risk as moneys of all other

persons who made deposits in the bank and no act of the parties thereafter could have been done which would have retroactively converted the common character of the deposits into preferred or secured deposits when the claimed security was prohibited by law, and therefore they are incapable of being ratified.

The very interesting and sound reasoning in sustaining this thought will be found in the decision of the Supreme Court of California in the case of Wood v. Imperial Irrigation District, 216 Cal. 748, 17 Pac. (2) 128, where the facts and the amendatory act of the State are similar to those involved in the present case, and it was there held that the deposits made prior to the amendatory legislation were not secured by the pledge given when the law did not authorize the giving of the pledge, nor was the pledge vitalized by the mere passing of a new law without repledging the security to secure the deposits made prior to the adoption of the law, and that the "Statute adopted with the view of authorizing banks to pledge their assets to depositors as security therefor must be strictly construed, and nothing should be left to implication or doubtful construction. In the absence of clear statutory provisions authorizing such pledging of assets, the general policy of the law will not sanction it."

Of course, it has long been settled by the Courts of the United States when in construing the national banking laws that the public policy of the United States in relation to National Banks appears in the Acts of Congress, which have for their primary purpose the

protection of all of the depositors of the bank alike, and no implied power exists to pledge the assets of a National bank as security for some of the depositors.

The further thought is urged by the District that even if it be held that the pledging of the bonds of the bank were illegal, yet the deposits by the Districts were public moneys and are special deposits giving rise to trust funds which have a preference over other deposits in the bank, is untenable when we are forced to the conclusion that the pledging of the assets of the bank as security in the first instance were unauthorized by the law, and the District could not make the deposit without taking security for them. No trust arises, nor any preference would be be justified merely upon the ground that the deposits were of public moneys. Nothing under such circumstances, and the laws of the United States exists but a simple debtor-creditor relationship between the public agency depositing the money and a depository bank. Texas & Pacific Ry. Co., v. Pottorff supra; O'Connor et al v. Rhodes, 79 Fed (2) 146; Ross v. Knott et al. (DC Fla) 13 Fed Supp 963; Illinois Central R. Co. v. Rawlings 66 Fed (2) 146.

Lastly; Has there been an adjudication in the State District Court which concludes the Receiver from the relief sought in the present action? The principle of law by which this question must be determined is well settled. The question relates to not one of authority but one of adjudication. The petition filed in the State District Court was entitled "In the matter of the Re-

ceivership of the Twin Falls National Bank." By the petition the Receiver prayed for an order of the Court authorizing and permitting him to sell the bonds at a private sale which was the limit of the power of the Court under Section 192, title 12 U. S. C. A. as it is there provided that the Receiver under the direction of the Comptroller takes possession of the assets of the bank and upon order of a Court of competent jurisdiction may sell all of the real and personal property of the bank on such terms as the Court shall direct. The procedure there does not contemplate a trial in Court nor place the affairs and assets of the bank under the jurisdiction and control of the Court, for the statute seems clear that in the allowance and payment of claims against the bank that matter is exclusively vested in the Receiver under the direction of the Comptroller. This is the interpretation given to the statute by the Supreme Court in the case of In re Chetwood, 165 U. S. 443, 458 where the Court said; "The Receiver acts under the control of the Comptroller of the Currency and the moneys collected by him are paid over to the Comptroller, who disburses them to the creditors of the insolvent bank. Under Section 5234 of the Revised Statutes, when the Receiver deems it desirable to sell or compound bad or doubtful debts, or to sell the real and personal property of the bank, it devolves upon him to procure "the order of a Court of record of competent jurisdiction," but the funds arising therefrom are disbursed by the Comptroller, as in the instance of other collections." This Statute was also before the Ninth

Circuit of appeals in the case of Fifer et al. v. Williams 5 Fed (2) 286, 288 where it is said: "In the present matter, as in the Chetwood case, supra, the application was entitled 'In The Matter' of the receivership of the insolvent bank. By the application the receiver did not submit himself and the affairs of the bank to the jurisdiction of the Court; nor did the presentation of the application operate to make the receiver an officer of the court, or place the assets of the bank under the control of the court 'in the sense in which control is acquired where a receiver is appointed by the court.' In re Chetwood, supra. He belongs to the executive branch of the government, and his custody of assets is not that of the court. Farrell v. Stoddard (D. C.) 1 F. (2d) 802. The procedure outlined by the statutes did not contemplate a trial in court. And no case is cited which lends support to the view that the statute intended that an objecting creditor could litigate with the receiver—who represents creditors and the insolvent bank—the question determined by him as to the advisability of disposing of the assets of the insolvent institution. There is no suit; no parties in the legal understanding of the term; no process must issue; no one is authorized to appear on behalf of the receiver or any one else, or to subpoena witnesses. It is an ex parte proceeding, and, though by the will of Congress put under judicial cognizance, is not by its own nature a judicial controversy. The fact that, when the receiver filed his application, the judge sought information and directed that notice be published that the court would hear persons inter-

ested in the insolvent bank upon the question of the proposed sale, does not change the administrative character of the proceeding. The Course followed was evidently, out of a cautious wish to gain advice that would be helpful in finally determining whether or not the order applied for by the receiver should be granted. Ex parte Cockroft, 104 U. S. 579, 26 L. Ed. 856. No statute gave to the objectors any legal right to demand to be heard or to be made parties to the proceeding; nor is there any statutory provision for an appeal from an order for the sale of the assets of an insolvent national bank."

The State District Court under the Federal Statute not having power to decide the question as to the legality of the deposit or to disburse it, or whether the pledge of the assets of the bank was legal may not assume jurisdiction to adjudicate these questions, and therefore its Order was limited to authorizing the sale of the bonds and the terms thereof and nothing more. To constitute an adjudication and bar to further consideration of a litigated question there must have been at some prior time, a judicial determination of the controversy. That has not been done under the record and the doctrine of res adjudicata could not be invoked in the present case.

In view of the conclusion reached that the pledge failed because of being illegal, the District is entitled only to a dividend as a general creditor and the relief prayed for by the plaintiff in his complaint, for the

recovery of $3,279.09 due and interest, being the balance of the $4,192.42 is granted with costs.

Findings and decree to be prepared by counsel for the plaintiff and submitted to counsel for the defendant and the Court within ten days.

No. 8408

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,
Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,
Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United States for the District of Arizona

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Nogales, Arizona,
Attorney for Appellee.

INDEX

TABLE OF CASES AND AUTHORITIES CITED

Page

Page

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STATEMENT OF THE CASE

While appellant's statement of the case is correct, we believe that the following brief statement recites all facts necessary for a consideration of the question involved.

The Nogales National Bank was appointed a depositary for Santa Cruz County, Arizona, and between

June 3, 1925, and May 7, 1928, the Treasurer of said County deposited with said bank $50,000 of the public moneys of said County. On the following dates the bank pledged to the County the following bonds as security for payment of the amount deposited and interest March 14, 1928, $15,000 bonds of Pima County School District No. 1 and $5,000 bonds of Salt River Valley Water Users' Association; June 28, 1928, $21,000 City of Nogales Waterworks Improvement bonds and $9,000 City of Nogales Sewage Disposal bonds; April 10, 1921, $7,000 bonds of Salt River Valley Water Users' Association. All of the pledged bonds were delivered to The National City Bank of New York as escrow holder.

The Nogales National Bank was closed on December 1, 1931, and on December 16, 1931, the bank was declared insolvent and a Receiver was appointed by the Comptroller of the Currency. At the time of closing $50,000 plus $166.66 interest was owing to the County upon its deposit. All of the bonds in its possession were delivered to the County Treasurer by the escrow holder on April 4, 1932, after the closing of the bank.

The $5,000 bonds of Salt River Valley Water Users' Association, pledged on March 14, 1928, were redelivered to the bank prior to closing. Since the bank closed the $15,000 bonds of Pima County School District No. 1 were sold by the County Treasurer and $2,000 of the Salt River Valley Water Users' Associa-

tion bonds which were pledged on April 10, 1931, have been paid to the County Treasurer. Since the closing of the bank $44,198.41 has been received by the County Treasurer from the following sources:

Dividends paid by the Receiver	$22,575.00
Sale of Pima County School District No. 1 bonds	14,257.16
Salt River Valley Water Users' Association bonds paid	2,000.00
Coupons of various bonds paid	5,366.25
Total	$44,198.41

The County brought this suit against the Receiver of The Nogales National Bank to foreclose its pledge lien upon the bonds remaining in the possession of the County Treasurer, to-wit, $21,000 City of Nogales Waterworks Improvement Bonds, $9,000 City of Nogales Sewage Disposal Bonds, and $5,000 bonds of Salt River Valley Water Users' Association. The Receiver filed his counterclaim to recover the bonds remaining in the possession of the Treasurer and the proceeds from the bonds and coupons which have been paid or sold. A decree was rendered by the United States District Court foreclosing the County's pledge lien in satisfaction of the amount owing on the deposit, to-wit, $5,968.25, and denying the counterclaim of the Receiver. From this decree the Receiver has appealed.

QUESTION INVOLVED

The sole question involved concerns the validity of the pledge after June 25, 1930, the effective date of the Act of Congress which enables national banks to give security for deposits of public moneys. (Title 12, Sec. 90, U. S. C. A. as amended June 25, 1930, c. 604, 46 Stat.) It will of course be remembered that the bank did not close until December 1, 1931, seventeen months after this amendment became effective.

ARGUMENT

Section 2634 of the Revised Code of 1928 of Arizona, which relates to the deposit of public moneys and which has been in effect during all of the transactions above mentioned, provides:

> "Any bank, before receiving such deposit, shall execute and deliver a bond, issued by a surety company approved by the treasury department of the United States and authorized to do business in this state, approved as to form by the legal adviser of the designating officers, and shall be in a penalty of not less than the amount the said bank may receive on deposit, or said bank may deposit with the . . . county treasurer . . . in lieu of a surety bond, regularly issued and interest bearing bonds of the following character: United States government bonds, state, county, municipal and school district improvement bonds, bonds of federal land banks, bonds of joint stock

land banks, bonds issued or guaranteed by corporations operating a United States reclamation project within the state when issued or guaranteed with the approval of the secretary of the interior, registered warrants of this state and registered county warrants when offered as security for moneys of the county by which they are issued. . . . The conditions of such bond, or the deposit of securities in lieu thereof, shall be that such bank will promptly pay to the parties entitled thereto, public moneys in its hands, upon lawful demand therefor, and will, whenever thereunto required by law, pay to the treasurer making the deposit, such moneys, with interest thereon as hereinafter provided."

The Act of Congress which became effective on June 25, 1930, (Title 12, Sec. 90, U. S. C. A. as amended June 25, 1930, c. 604, 46 Stat.) provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such banking association is located in the case of other banking institutions in the State."

The trial court, following the cases cited in its memorandum opinion, (Transcript of Record, page 48) found and held that the pledge was intended as a continuing one to run until the repayment of the deposit and extended until the closing of the bank; that when

the lack of power of the bank to pledge the bonds was removed by the above amendment the original agreement could as to the future have full effect; that upon the passage of the amendment The Nogales National Bank was empowered to pledge its security and to ratify an executory or continuing pledge, previously beyond its power, and that it was not necessary to go through the formality of executing a new pledge.

Lewis vs. Fidelity & Deposit Co. of Maryland, 54 S. Ct. 848, 292 U. S. 559, 78 L. Ed. 1425, is the last word of the Supreme Court upon the question. The Court held that a pledge which was made prior to the amendment became effective upon the passage of the amendment and that it was not necessary that the bank give a new bond or security after June 25, 1930. The Court states:

> "The receiver contends that, even if national banks are authorized under the 1930 act to give a general lien upon their assets of the character described by the Circuit Court of Appeals, the judgment should be reversed because the bond antedated the act. It appears that the balance on hand June 25, 1930, was withdrawn soon thereafter; that between June 25, 1930, and the appointment of the receiver, May 23, 1932, deposits were regularly made aggregating a large sum; that from time to time checks were drawn against these deposits; and that all of the balance in bank when the receiver was appointed represented deposits made after the passage of the act. The appointment of the bank as depository in 1928 and

the bond were to cover a period of four years. Though the lien was in form security for the bond, the extent of liability was to be measured by the unpaid balance. Thus, the transaction was not completed in 1928; it was contemplated that there would be continuous dealings between the parties for four years. In fact, the relation continued until the appointment of the receiver. Throughout the whole period the parties intended that the lien should be operative and supposed that it was. The appointment was within the power of the state to confer and of the bank to accept, but, by reason of the paramount federal law, one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from the date of the act. A statute is not retroactive merely because it draws upon antecedent facts for its operation. Compare Cox v. Hart, 260 U. S. 427, 435, 43 S. Ct. 154, 67 L. Ed. 332; Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682; Petterson v. Berry (C. C. A.), 125 F. 902; Hartford Fire Insurance Co. v. Chicago, M. & St. P. Ry. Co. (C. C.), 62 F. 904, 910; Rosenplanter v. Provident Savings, etc., Soc. (C. C. A.), 96 F. 721, 46 L. R. A. 473. It was not necessary to go through the form of executing a new bond. Compare Jones v. New York Guaranty & Indemnity Co., 101 U. S. 622, 627, 25 L. Ed. 1030."

In Kavanaugh vs. Fash (C. C. A. 10), 74 F. (2d) 435, the Court held that the statute is not procedural in nature and does not provide the manner in which the indemnity shall be effected, and that the enabling act vitalized a previously made pledge with respect to money deposited after it became effective.

In Ross vs. Knot, (District Court, N. D. Fla.) 13 F. Supp. 963, both the deposit and the pledge of bonds were made prior to June 25, 1930, the effective date of the amendment. We quote as follows from the opinion:

> "In the case at bar, the Florida Laws permitted the pledging of securities by banks and a continuing agreement was entered into by the treasurer with the First National Bank of Perry, which agreement was that the treasurer would deposit money, and would recognize that bank as a public depository. These securities were pledged for the safekeeping and prompt payment by the bank of these deposits. Thus far, the only distinction between the Lewis Case and the instant case is that there a general lien was provided upon the giving of bond, while in the case at bar a specific lien was contemplated upon the securities pledged with the state treasurer. After the adoption of the amendment of June 25, 1930, it is true that no deposits were made by the state treasurer in the instant case, but there was a balance on deposit which remained due and unpaid until the bank closed its doors in the latter part of October, 1930. It is true, according to the allegations of the bill, that the state treasurer made no further de-

posits and that he did not call on the bank to repledge its securities, but that he contented himself with the security pledged prior to the amendment; but it is likewise true that the legislatively established public policy of the state of Florida required security to be taken for such deposits, and after June 25, 1930, national banks were authorized to give it. Moreover, on June 25, 1930, and thereafter, such security was held under the pledge agreements set up in the bill.

"Deposits in a bank create but one liability, that of debtor and creditor; and to say that the pledging of the security before the amendment was null and void and inoperative to protect a balance in the hands of the bank after the obstacle, which prevented an effective original pledge, was removed and the original agreement could be given the effect intended, would in the instant case be to allow the bank to continue to hold unpaid balances, having theretofore delivered security, at a time when the state law in effect required, and the federal law authorized, security to be given. To say that the original agreement of the parties may be given the effect intended as to deposits made after June 25, 1930, but not as to unpaid balances remaining on deposit after that date is to sacrifice equitable principles upon the altar of tenuous distinctions. In each situation the relation of the bank and the depositor is the same, that of debtor and creditor. It is hardly to be presumed that, in order to make the unpaid balance a deposit for which the security would be liable, it would be necessary for the treasurer to have appeared at the

> bank window, give his check for the unpaid balance; and, the next moment, deposit it."

The District Court is undoubtedly correct in its opinion, especially in view of the Supreme Court's statement that a repledging of the securities is unnecessary. Lewis vs. Fidelity & Deposit Co. of Maryland, supra. There are really two separate transactions when security is given, the deposit and the pledge; and the pledge is the only feature that is being attacked in this case. The debtor-creditor relationship which results from the deposit is not affected by the fact that a pledge is or is not given as security. Neither would this relationship be changed or affected by withdrawing the funds on June 26, 1930 and immediately redepositing them. The same with the pledge; handing the pledged bonds to an officer of the bank with immediate return thereof to the pledgee is unnecessary and the Supreme Court has so stated. The validity of the pledge is not affected by the fact that the deposit may have been made prior to June 25, 1930 for the reason the bank was authorized to accept deposits both before and after that date. The debt which resulted from the deposit was valid and enforceable both before and after the passage of the amendment. The conduct of the parties shows an intention to continue the pledge after the amendment became effective and the trial court so found. A pledge may be given to secure a pre-existing indebtedness. 49 C. J. page 906, Sec. 28. The indebtedness upon the deposit was en-

forceable at all times, and the pledge became valid and effective from and after June 25, 1930.

In Haynes v. City of Woodward, (District Court, N. D. Okla.), 6 F. Supp. 270, the court states:

> "It is true that originally the bonds were given by the bank to the treasurer of the City of Woodward to secure the deposit prior to June 25, 1930, the date on which the federal law was enacted. However, the Woodward bonds amounting to $28,000 were continued in the possession of the treasurer of the City of Woodward, after the enactment of the law herein set out of June 25, 1930, and, by the acts and conduct of both the city treasurer and of the bank subsequent to June 25, 1930, were treated as a pledge to the city to secure said deposit. The government bonds in the sum of $100,000 were pledged on March 26, 1930. On December 3, 1930, however, these bonds were surrendered, and there was substituted therefor United States Treasury bonds of the par value of $101,950. This act was approved by the officers of the bank. On June 10, 1931, the $101,950 of Treasury bonds were surrendered pursuant to the instructions of the First National Bank of Woodward and there was reissued to the treasurer $91,950 in bonds on a joint custody receipt signed by the First National Bank of Woodward; $10,000 of these bonds were surrendered to the bank.
>
> "However, the conduct of the bank at all times subsequent to June 25, 1930, approving the pledge to the city of Woodward, in the judgment of the court, would have the same effect as if said entire

pledge had been made subsequent to June 25, 1930."

And in Haynes v. United States Fidelity & Guaranty Co. (District Court, W. D. Okla.) 6 F. Supp. 272, it was held that the court should look to the substance of the transaction rather than its form.

Section 2634 of the 1928 Revised Code of Arizona and its predecessor statutes have been in effect since September 1, 1901, since which time security for deposits of public money has been required. (Section 3771, Revised Statutes of Arizona, 1901, amended by Chapter 96, Session Laws of Arizona, 1909, codified under Section 4643, Revised Statutes of Arizona, 1913, Civil Code, amended by Chapter 45, Session Laws of Arizona, 1923, amended by Chapter 71, Session Laws of Arizona, 1927, and codified in 1928 under Section 2634.) Therefore, for the past thirty-five years the public policy of the State with respect to securing deposits of public funds has been firmly established. This Circuit of Appeals has stated in Capital Savings and Loan Ass'n., et al., v. Olympia Nat. Bank, et al., 80 F. (2d) 561:

"In Texas & P. Ry. Co. v. Pottorff (C. C. A. 5) 63 F. (2d) 1, 3, affirmed 291 U. S. 245, 54 S. Ct. 416, 78 L. Ed. 777, supra, the court said: 'Cases, and these are supported, we think, by the better reasons, holding that, where the Legislature of a state has declared in specific statutes that deposits of public money must be secured this sufficiently indicates the public policy of the state toward the

securing of public deposits, to sustain contracts whether in exact accordance with the statute or not, made in good faith for their security, are. (Many authorities cited.)'

"Again in Fidelity & Deposit Co. of Maryland v. Kokrda, supra, 66 F. (2d) 641, at page 643, we find the following language: 'While there are decisions to the contrary, the rule supported by many well reasoned decisions is that where the legislature of a state has declared by express statutory enactment that deposits of public funds shall be secured, thereby indicating that the public policy of the state is not only to permit but to require the securing of such deposits, contracts to secure such deposits made in good faith should be sustained, although not entered into in exact accord with the statutory requirements."

To hold that the public funds must have been redeposited after June 25, 1930 would be a rejection of the intent of Congress. For years prior to June 25, 1930, national banks have accepted public moneys on deposit and have given security with the knowledge and consent of the Comptroller of the Currency, under the false idea, it is true, that the banks had power to give such security. Federal courts have held that the power to pledge existed prior to the 1930 amendment and it was not until recently that the Supreme Court decided otherwise. Undoubtedly these facts were known by Congress. Undoubtedly at the time it adopted the 1930 amendment Congress was aware that *then,* all over the nation, public funds were on deposit in na-

tional banks with security given for payment. Undoubtedly, therefore, the amendment was intended to apply to public funds *then* on deposit and to securities *then* held by the depositors, as well as to those to be pledged in the future. No contrary intention is shown or even intimated. No intention or requirement is intimated that the funds then on deposit should be withdrawn and redeposited or that the securities theretofore given should be repledged.

This court further stated in Capital Savings & Loan Association vs. Olympia Nat'l. Bank, supra, quoting from Fidelity & Deposit Co., of Maryland vs. Kokrda (C. C. A. 10) 66 F. (2d) 641, 642, as follows:

> "The plain purpose of the amendment was to remove any doubt of the power of National Banks to give security for public deposits, and in that respect to enable them to invite public deposits on an equal footing on State Banks."

The appellee rests its case upon the law as stated by the Supreme Court in Lewis vs. Fidelity & Deposit Co. of Maryland, supra:

> "When that obstacle" (lack of power to give security) "was removed by the Act of June 25, 1930, the *original* agreement could as to the future be given the effect intended by the parties." (Italics ours.)

There is no doubt concerning the original agreement or the intention of the parties and now that the obstacle has been removed they should both be given effect.

The remainder of this brief will be in answer to the arguments contained in the opening brief of the appellant.

ANSWER TO APPELLANT'S OPENING BRIEF

Commencing on page 16 of Appellant's opening brief, we agree with appellant that prior to the passage of the amendment national banks were without power to secure deposits of public funds. That point is settled and there is no disagreement. But we disagree with appellant's statement that the amendment did not validate pledges as to deposits made prior to June 25, 1930, unless there is a repledging of the security or a redeposit of the funds. This statement, however, is vague. It is true that the amendment did not validate the prior deposit and pledge of security if, *after* the amendment, we look back at the situation as it stood *prior* to the amendment. For example, if a bank closed prior to June 25, 1930, and was in liquidation on that date, certainly the amendment would not reach back and validate a prior *closed* transaction. But if the bank remained open seventeen months after June 25, 1930, without a withdrawal of the deposit or a surrender of the security with both parties intending that the pledge previously made should be effective *after* the effective date of the amendment, we contend that the original agreement should "as to the future be given the effect intended by the parties."

Commencing on page 18 of his opening brief the appellant departs somewhat from the subject now be-

ing considered and states his disapproval of this court's opinion that the purpose of the amendment was to remove any doubt of the power of national banks to give security for public deposits. Of course, right or wrong, what the Supreme Court says is the law; and the Supreme Court seems to disagree with this court. But regardless of the *purpose* of the amendment, prior to the date of the amendment there was a lot of doubt concerning this power of national banks—so much so, in fact, that most Federal courts recognized such power. And we can positively state that this amendment removed all such doubt. And Congress knew that it was removing this doubt, regardless of its *purpose* in passing the amendment. The principle is the same notwithstanding the purpose of the amendment and Congress undoubtedly had this principle in mind and intended that pledges previously made would "as to the future be given the effect intended by the parties."

Continuing on pages 20 et seq. of appellant's opening brief, we fail to see the difference, so far as the legal effect is concerned, between security given to run for a definite term of four years (as in Lewis vs. Fidelity & Deposit Co., supra) and an executory or continuing pledge for an indefinite time intended to be effective after June 25, 1930. Appellant mentions but fails to point out the difference. He states, further, that the redepositing of the funds after the passage of the amendment (in the Lewis case) "was ob-

viously a new agreement." He overlooks, however, the fact that it is the pledge and not the deposit which he is attacking in this case. It is true that in the Lewis case other funds were later deposited; but there was never any subsequent agreement concerning the security given prior to June 25, 1930, and the Supreme Court held that none was necessary. Without showing the difference appellant states that there is a vast difference between the lien on the bank's assets which arose from giving the bond and the lien of a pledge. We fail to see any legal distinction when both liens were void prior to June 25, 1930, and both liens are valid after that date.

Appellant stresses the failure of the Supreme Court in the Lewis case to decide whether or not the amendment would validate a lien in respect to deposits made before June 25, 1930. The question was not before the court and the court so stated, and added:

> "Compare Gross v. United States Mortgage Co., 108 U. S. 477, 488, 2 S. Ct. 940, 27 L. Ed. 795; West Side Belt R. Co. v. Pittsburg Construction Co., 219 U. S. 92, 31 S. Ct. 196, 55 L. Ed. 107; Charlotte Harbor & Northern R. Co. v. Welles, 260 U. S. 8, 43 S. Ct. 3, 67 L. Ed. 100."

If these cases which the Supreme Court invites us to compare are indicative of the Supreme Court's opinion, certainly appellee's contentions should be upheld in every respect. Gross vs. United States Mortgage Co., involved the validity of a mortgage which was made at the time when the mortgage was invalid

under the existing local law, but which was subsequently validated. As to the validating act the Supreme Court said:

> "That the Act in question is not repugnant to the Constitution, as impairing the obligation of a contract is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the State, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in Satterlee v. Matthewson, 2 Pet., 412, and, in substance in Watson v. Mercer, 8 Pet., 110, that 'It is not easy to perceive how a law, which gives validity to a

void contract, can be said to impair the obligation of that contract.' "

In West Side Belt R. Co. vs. Pittsburg Construction Co., the Supreme Court held that an act legalizing contracts of foreign corporations applied to contracts theretofore invalid, and stated:

"In Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876, such an act was sustained against a charge that it devested vested rights and impaired the obligation of a contract. The act considered made valid the deeds of married women which were invalid by reason of defective acknowledgments, and avoided a judgment in ejectment rendered against one of the parties to the action because of such a defect in a deed relied on for title. The controversy was between the successor by descent of the married woman and the grantee in the deed. It was said in the argument that the descents had been confirmed by two judgments of the supreme court of the state against the deed, adjudicating it to be void on points involving its validity, which judgments, it was contended, were conclusive evidence that the deed was no deed, and that the rights acquired by descent were absolute vested rights. The act was nevertheless sustained, as we have stated.

"Satterlee v. Matthewson, 2 Pet. 380, 7 L. Ed. 458, is to the same effect. Title was set up as a defense in an action of ejectment to which the plaintiff replied that, conceding it to be the older and better than his, nevertheless could not be set up against him, as the defendant was his tenant.

> The trial court took that view, and the supreme court of the state reversed it on the ground that, by the statute law of the state, the relation of landlord and tenant could not subsist under a Connecticut title. Before the second trial of the case the legislature of the State (Pennsylvania) passed a law providing that the relation of landlord and tenant should exist under such titles. This court affirmed the judgment of the supreme court of the state, sustaining the law."

And in Charlotte Harbor & Northern R. Co. vs. Welles, the Supreme Court held that a state legislature may validate assessments previously made for the construction of roads and bridges, and stated:

> "In a petition for rehearing, plaintiff in error attacked the reasoning and conclusion of the court, and asserted against them the inhibition of the 14th Amendment of the Constitution of the United States, which precludes a state from the taking of property without due process of law. The specification of the grounds is that 'the said bill (to quote from it) attempts to legalize a proceeding of the county commissioners of De Soto county, Florida, who were mere administrative officers, and which proceeding was void *ab initio* and without jurisdiction, and under which proceeding certain taxes were levied against the property of your petitioner, prior to the passage of said act of the legislature, and therefore the said act of the legislature, in so far as it purports to create a liability on your orator for taxes previously assessed against your orator under a proceeding

of said administrative officers, is void *ab initio* and without jurisdiction.' The court considered the petition for rehearing and denied it.

"In support of the contention of the petition, plaintiff in error makes a distinction between a curative statute, which it is conceded a legislature has the power to pass, and a creative statute, which, it is the assertion, a legislature has not the power to pass. The argument in support of the distinction is ingenious and attractive, but we are not disposed to review it in detail.

"The general and established proposition is that what the legislature could have authorized it can ratify, if it can authorize at the time of ratification. United States v. Heinszen, 206 U. S. 370, 51 L. Ed. 1098, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688; Phillip Wagner v. Leser, 239 U. S. 207, 60 L. Ed. 230, 36 Sup. Ct. Rep. 66; Stockdale v. Atlantic Ins. Co., 20 Wall. 323, 22 L. Ed. 348. And the power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration."

From pages 22 to 30 of his brief appellant endeavors to give a retroactive effect to the Act of June 25, 1930, as applied to this case and thus departs from the true proposition involved. As we have heretofore stated, the appellee does not contend that the Act will reach back and validate the situation as it existed prior to June 25, 1930. For example if a court were to consider the rights of the parties as they existed, for instance, on June 1, 1929, prior to the amendment, the

court would naturally hold the pledge to have been void *on that date;* and if the court should hold that the pledge was valid as of June 1, 1929, because of the later amendment, the court would then be giving the amendment a retroactive effect. On the contrary a retroactive operation would not be given the amendment by holding that the previously given pledge was valid *after* the amendment was adopted when the parties so intended, for the reason that, after the adoption of the amendment the parties had the legal right to so intend; and in so holding the court would not be applying the amendment to facts as they existed prior to the adoption of the amendment. Appellant's argument wholly ignores the law as stated by the Supreme Court (Lewis vs. Fidelity & Deposit Co. of Maryland, supra) "when that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties. . . . A statute is not retroactive merely because it draws upon antecedent facts for its operation."

The quotation from 25 R. C. L. 785 and 786 on pages 23 to 25 of appellant's opening brief is not applicable for the reason that a retrospective operation of the statute is not sought by the appellee inasmuch as giving effect to the intention of the parties existing after the amendment was adopted does not constitute a retroactive operation.

The statute does not create any new rights or take away any vested rights. In 25 R. C. L., page 789, Sec. 36, it is stated:

"The better rule of construction, and the rule peculiarly applicable to remedial statutes, however, is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty."

And in the same volume of R. C. L. on page 791, Sec. 38, the text states:

"But the rule (against retrospective operation) does not prevent the application of statutes to proceedings pending at the time of their enactment where they neither create new, nor take away any vested, rights."

Harvey vs. Tyler, 2 Wallace 328, 17 L. Ed. 871, cited by appellant, is not in point, it being merely therein decided that an agreement to pay compensation for procuring a contract to furnish supplies to the government is against public policy and unenforceable. And we fail to find the sentence quoted on page 26 of appellant's opening brief.

In United States vs. Union Pac. Ry., 98 U. S. 569, 25 L. Ed. 143, cited by appellant, the Supreme Court held that the statute there considered was not intended to change substantial rights and was intended to provide only a procedure which would give a larger scope for the action of the court. The case is not in point.

In U. S. Fidelity & Guaranty Co. vs. United States, 209 U. S. 306, 52 L. Ed. 804, cited by appellant, the Supreme Court refused to retroactively apply a procedural statute to a cause of action which existed prior to the passage of the act. In the case at bar no cause of action existed prior to the amendment of June 25, 1930.

In City Railroad vs. Citizens' Street Railway Co., 166 U. S. 557, 41 L. Ed. 1114, cited by appellant, the Supreme Court refused to give retrospective effect to a statute when such retroactive operation would have destroyed a vested contract right to operate a street railroad. Neither the facts nor the law involved are comparable to those involved in the case at bar.

In Schwab vs. Doyle, 258 U. S. 528, 66 L. Ed. 747, cited by appellant, the Supreme Court refused to give retroactive effect to the Estate Tax Act of 1916; clearly not in point. A statute imposing a tax is construed strictly in favor of the taxpayer.

In the argument on pages 27 and 28 of his opening brief appellant contends that either the pledge or the deposit must have been made after June 25, 1930. Contrary to appellant's suggestion the Supreme Court does not even intimate such a requirement. The Supreme Court states in the Lewis case that the intention of the parties after that date is given effect by the amendment. The intention of the parties in the case at bar that the pledge should be effective after June 25, 1930, is undisputed.

The Supreme Court has held on several occasions that a statute is not retroactive merely because it relates to antecedent facts or draws upon antecedent facts for its operation.

Lewis v. Fidelity & Deposit Co. of Maryland, supra;

Reynolds v. United States, 54 S. Ct. 800, 292 U. S. 443, 78 L. Ed. 1353.

In Cox v. Hart, 260 U. S. 427, 435, 43 S. Ct. 154, 67 L. Ed. 332, the court again stated the above rule and held that an act which gives an entryman on desert land certain rights applies to those who complied with the requirements of the act prior to the date the act became effective.

In Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682, the Supreme Court held that the repeal of a usury law cuts off the defense of usury even in actions upon contracts made prior to the repealing act. The court states:

> "The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon

contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases. Curtis v. Leavitt, 15 N. Y., 9; Bank v. Allen, 28 Conn., 97; Welch v. Wadsworth, 30 Conn., 149; Andrews v. Russell, 7 Blackf., 474; Wood v. Kennedy, 19 Ind., 68; Danville v. Pace, 25 Grat., 1; Parmelee v. Lawrence, 48 Ill., 331; Woodruff v. Scruggs, 27 Ark., 26.

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains *in fieri,* and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Plattsmouth, decided at the present Term (ante, 414). And see Lewis

> v. McElvain, 16 Ohio, 347; Johnson v. Bently, Id., 97; Trustees v. McCaughy, 2 Ohio St., 155; Satterlee v. Matthewson, 16 S. & R., 169; 2 Pet., 380; Watson v. Mercer, 8 Pet., 88."

In United States v. Trans-Missouri Freight Association, 166 U. S. 290, ... S. Ct. ....., 41 L. Ed. 1007, it was held that retroactive effect is not given to a statute making combinations in restraint of trade illegal, by applying the statute to a continuation, after its passage, of a preexisting contract.

We repeat a portion of the quotation from Gross v. United States Mortgage Co., supra:

> "When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the State, upon the execution of a contract like this, it cannot be held that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make."

In Rosenplanter v. Provident Sav. Life Assur. Society of N. Y. (C. C. A. 10) 96 Fed. 721, wherein the effect of repealing an act relating to forfeitures was being considered, the court stated:

> "The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions. 'The laws with reference to which the parties must be assumed to have contracted . . . were those which, in their direct or necessary legal operation, controlled or affected the obligations of such con-

> tract.' Insurance Co. v. Cushman, 108 U. S. 51, 65, 2 Sup. Ct., 236. Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts, or as an impairment of vested rights." (Many cases cited.)

In Petterson et al. v. Berry, (C. C. A., 9) 125 Fed. 902, this court held that the repeal of a usury statute takes away the debtor's privilege of avoiding a usurious contract, even though the contract may have been made prior to the repealing act.

The Act of May 24, 1934, relating to naturalization applies to an alien whose husband or wife was naturalized "after the passage of this Act, as here amended." Nevertheless, in United States v. Bradley, (C. C. A., 7) 83 F. (2d) 483, the court held that an alien whose wife was naturalized prior to the amendment was entitled to naturalization under the amendment. The court states:

> "Appellant contends that appellee's construction of the amendment would render the act retroactive. We think not. Authority is abundant to support the proposition that an act is not retroactive merely because it involves facts which antedate the passage of the act."

Relative to a lease contract, the court states in Hartford Fire Insurance Co. et al. v. Chicago, M. & St. P. Ry. Co., (Circuit Ct., N. D. Iowa) 62 Fed. 904:

"The rule applicable to cases of the character of that now before the court, wherein a party seeks to evade the obligation of a contract to which he is a party, on the ground of public policy, is that the court will not lend its aid to enforce the contract if, at the time its aid is sought, the contract is contrary to the then existing public policy. The court, in such case, refuses its aid for the enforcement of the contract, not because such is the right of either of the contracting parties, but because the public interests are adverse to the enforcement of the contract. If, however, at the time when the aid of the court is sought to enforce the terms of an existing contract, the public interests do not demand that the court should refuse to aid in enforcing the contract according to its terms, the court would not be justified in refusing its aid simply because *at some previous time,* under the then existing laws, and as circumstances then were, such aid would have been refused if then demanded." (Italics ours.)

In re Dearborn's Estate (Okla.), 2 P. (2d) 93, the court held that where parties in good faith comply with marriage forms, the law will treat their continued relation as husband and wife after removal of a previous disability, as a valid marriage.

On page 28 of his brief appellant states that "the application of the statute to deposits that were made prior to June 25, 1930, under a continuing pledge agreement and bond that were likewise made prior to June 25, 1930, would give the statute a retroactive

operation; whereas, the application of the statute to deposits that were made subsequent to June 25, 1930, the collateral in pursuance of the pledge having been delivered prior to the operative date of the amendment, would not give the statute a retroactive operation . . ." Appellant overlooks the fact that in this case he is attacking the pledge and not the deposit. It is apparent that the law as stated by the Supreme Court (Lewis v. Fidelity & Deposit Co., of Maryland, supra) forces him to the position he assumes, to-wit, that a previously made pledge is vitalized by the amendment. Inasmuch as he is attacking the pledge and not the deposit, the shots that he thus fires at the deposit are therefore without logic or reason. His quotation on the following page (29) from Columbus Spar v. Starr, 214 N. Y. Supp., 652, states Appellee's position exactly:

> "A statute does not operate retrospectively when it is made to apply to *future transactions,* merely because those transactions have relation to and are *founded upon antecedent events.*" (Italics ours.)

In the case at bar the "future transactions" are made up of the intention of the parties that the continuing pledge should remain effective after June 25, 1930, and the fact that the bonds actually remained on pledge for seventeen months after that date.

In most of the cases cited on pages 31 to 39 of appellant's opening brief the contracts were consummated prior to the enactment of the enabling act, or

there was no enabling act and the parties themselves endeavored to ratify a void contract; situations wholly different from that now confronting the court. Appellant is entirely correct in his quotation from McDougald v. New York Life, (C. C. A., 9) 146 Fed. 678, but we fail to see its application to this case. Inasmuch as there was no later enabling act the same can be said of California Natl. Bank v. Kennedy, 167 U. S. 362, 17 S. Ct. 831, 42 L. Ed. 198.

We do not disagree with appellant's contentions on pages 40 to 49 of his opening brief. The receiver may recover illegally pledged assets without making restitution to the pledgee, the stockholders are not bound by unlawful acts of the receiver, and dividends should be paid to unsecured creditors in proportion to the amounts of their respective claims. But they do not apply to this case. Appellee stands squarely on the proposition that the pledge was valid after June 25, 1930. Appellant implies, without a direct statement, that the amendment was adopted and the pledge was made for the benefit of the County. We quote further from Capital Savings & Loan Ass'n. v. Olympia Nat. Bank, supra:

> "Whatever may be the purpose of the state statutes, which we will consider hereafter, it is clear that the federal statute just quoted was enacted for the protection not of state officers but of national banks and their depositors."

On pages 50 to 57 of his opening brief appellant quotes from Wood v. Imperial Irrigation District,

(Cal.) 17 Pac. (2d) 128, wherein it was held that an irrigation district is not a political subdivision or a municipal corporation, hence the funds of such district are not public funds; further, that the constitution of California does not permit banks to secure deposits of irrigation districts. The court states:

> "We are of the view that the language of the constitutional provisions does not permit the inclusion of an irrigation district as one of the entities which may be empowered to draw from the assets of a bank its securities as a protection against loss for the benefit of one class of depositors to the prejudice of another."

The court held further that the securing of such deposits is contrary to public policy. Such is not the case with public funds deposited in Arizona. Further, the court held that the late act which authorized such deposits was not complied with. The court directly opposes the decisions in federal cases upon the subject when it states that "no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or deferred deposits. . . . A contract void because it stipulates for doing what the law prohibits is incapable of being ratified." Here the court erroneously uses the word "retroactively" which in connection with such matters means the application of the act to the situation and rights of the parties *prior* to the passage of the act. Of course nothing could have been done by the parties which

would have validated the pledge on a day *prior* to the adoption of the act.

Thompson, Receiver, v. Twin Falls Highway District (not reported) set forth in the appendix to appellant's opening brief is decided upon the authority of Wood v. Imperial Irrigation District, supra, and in disposing of the question Judge Cavanaugh adopts the very language of the California court. Both cases wholly ignore the words of the Supreme Court: "A statute is not retroactive merely because it draws upon antecedent facts for its operation"; When the "obstacle was removed . . . the original agreement could as to the future be given the effect intended by the parties." The decision of Thompson, Receiver, v. Twin Falls Highway District is not supported by any other federal cases and is contrary to the rule announced in every federal court including the Supreme Court of the United States.

On page 58 of his opening brief appellant complains of the action of the trial court in defining the conditions under which the pledge was made. The Transcript of Record (page 74) shows that the funds deposited were public moneys of the County and the Arizona statute of course fixes the conditions of the pledge. The facts evidence a pledge even though the bonds were actually held by an escrow agent. Fidelity & Deposit Co. of Maryland v. Kokrda, supra.

We are prompted to pass as unimportant the argument on page 59 of appellant's brief. The pledge being valid, of course the moneys received by the Coun-

ty from the pledged securities constitute "payments" to appellee. If the pledge was invalid notwithstanding the Act of June 25, 1930, the "payments" received from payment or sale of the pledged bonds must be returned to the Receiver.

CONCLUSION

Excepting only the U. S. District Court for the Southern Division of Idaho, every federal court which has approached the question sustains the validity of the pledge during the seventeen months between June 25, 1930 and the date the bank closed. We contend that the "obstacle was removed by the Act of June 25, 1930" and that the original agreement should now "be given the effect intended by the parties." And we therefore respectfully submit that the decree of the trial court should be affirmed.

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No. 8408

United States

Circuit Court of Appeals

For the Ninth Circuit

C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,

Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,

Appellee.

Reply Brief for Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

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INDEX

TABLE OF CASES

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May It Please the Court:

It would appear that the issues in this case have been narrowed down to the sole question—did the passage of the Amendatory Act of June 25, 1930, validate

an illegal pledge made in 1928, as to deposits made prior to June 1, 1928.

Was it the intention of Congress to validate a hitherto illegal and void pledge or was it a new grant of power as to the future? It is difficult to tell how much Congressmen knew of banking practices but there is no evidence whatsoever that they intended the Amendment to be retroactive in its application. It is obvious that Congress knew the original act had not given National Banks power to pledge assets for the Supreme Court said in Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 258, 54 S. Ct. Rep.:

> "This amendment indicates that Congress believes that the original act had not granted general power to pledge assets to secure deposits. The fact that the amendment was made to Section 45 indicated that the power to pledge was granted only as an incident of the public officers duty to demand a pledge. If, as is suggested, the 1930 Amendment was passed merely in order to settle doubts as to the power of a National Bank to pledge its assets to secure deposits, the amendment would have been made, not to Section 45 but to Section 8 which contains the grant of incidental powers."

and quoted from the 72 Congressional Record 6243 as follows: Senator Thomas, in introducing the bill said:

> "It is a bill *simply to confer* on a National Bank the same opportunity for the giving of security for the safe keeping and prompt payment of State and County moneys, as is authorized with reference to State banking institutions." (Italics mine.)

The expression *simply to confer* cannot be interpreted to mean "and to validate illegal pledges previously made." It is earnestly urged that there is not the faintest suggestion of an intention to pass a validating or retroactive statute. The expression ***simply to confer*** narrows and restricts its meaning.

The case of Lewis v. Fidelity & Dep. Co., 292 U. S. 559, relied upon by appellee, the court virtually said that the Amendment was not intended to be retroactive when it said "a statute is not retroactive merely because it draws on antecedent facts for its operation" continuing it said, "The appointment of the depository was within the power of the State to confer and the bank to accept but by reason of the paramount Federal Law the pledge could not arise. When that obstacle was removed by the amendment the original agreement could as to the future be given the effect intended by the parties and *the lien become operative as to deposits thereafter made.* (Italics mine.) It is a far cry from the Lewis case where all of the deposits were made after the passage of the act to the case at bar where both the pledge and the deposits were made over two years prior to the passage of the Act. The court in the Lewis case specifically declined to pass on the question raised in the case at bar.

The antecedent facts to which reference was made by the Supreme Court were the fact of the existence of an unexpired pledge for a definite term of years made before the operative date of the amendment and extending from a definite period beyond the operative

date of the amendment. The fact that the funds were entirely withdrawn, redeposited and added to after the passage of the Act in the Lewis case presents a situation utterly different from our own. The Lewis case is discussed at length in appellant's brief on pages 20, 21, 27 and 28 to which reference is now made.

In Cox v. Hart, 260 U. S. 427, 435, was involved a proviso exempting squatters on public land from the operation of a general prohibition. The Court pointed out that the one purpose of the provision was to exclude from the operative effect of the new rule cases which might have arisen under the prior law. It was plainly intended to be retrospective.

Jones v. New York Guaranty & Indemnity Co., 101 U. S. 622, 627 cited by appellee on page 7, turned on the power of a corporation chartered by the state.

Ewel v. Daggs, 108 U. S. 143, quoted by appellee was on a question as to whether or not the repeal of the usury statute made a debt hitherto uncollectible, because of usury, thereafter collectible. The court said that a usury statute "was in its nature a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause operated retrospectively." There can be no proper application of that case to the one at bar.

Kavanaugh v. Fash, 74 F. (2d) 435, quoted by appellee on page 8 simply is not in point as appellant has

pointed out on page 33 of appellant's brief.

Reynolds v. United States, 292 U. S. 443, 54 S. Ct. 800, 78 L. Ed. 1353 quoted by appellee is not at all in point. That case involved the right of a United States hospital to deduct from a patient's pension a sum for board, maintenance, etc. while hospitalized. Upon the discharge of the patient, one Reynods, a Spanish-American war veteran, in April 1930, the hospital applied the sum of $3259.17, the amount remaining from his pension after payment for clothing and cash advanced.

Section 202 (10) of the World War Veterans' Act, as amended (U. S. C. A., title 38, 484 (38 U. S. C. A., 484)), directs that all hospital facilities under the control and jurisdiction of the Veterans' Bureau shall be available "for every honorably discharged veteran of the Spanish-American . . . suffering from neuropsychiatric . . . ailments," with the following proviso:

> "That the pension of a veteran entitled to hospitalization under this section shall not be subject to deduction, while such veteran is hospitalized in any Government hospital, for board, maintenance, or any other purpose incident to hospitalization."

This proviso appeared for the first time in the Act of July 2, 1926, c. 723, p. 9, 44 Stat. 794.

It is to be noted that the proviso in the act appeared for the first time in the Act of July 2, 1926. The deduction was made in April 1930, *four years after* the proviso prohibiting such deduction became a law. (Italics mine.) It would seem that no further comments are necessary.

In Ross v. Knott, 13 F. Supp. 963 (page 8 appellee's brief) the Florida district judge assumed that the Lewis case was decisive of the question involved in the case at bar. Such seems to have been a hasty and unwarranted conclusion as I have tried to point out on page 27 of appellant's brief.

The decision of the Court below appears to have been largely influenced by the opinion rendered from Florida in the case of Ross v. Knott (supra). In that opinion from Florida there was some reference to some cases suggested in the Lewis case with apparent assumption that those cases bore on the question of deposits made prior to the act. An analysis of those cases suggested in the Lewis case for comparison to determine whether the amendment of June 25, 1930, validated the lien with reference to the deposits made prior to the amendment will disclose that these cases mentioned are wholly inapplicable. In the Lewis case the Court said:

> "We have no occasion to consider whether the Act of June 25, 1930 would have validated the lien as to deposits made before that time. Compare Gross v. United States Mortgage Co., 27 L. Ed. 795; West Side Belt Railroad Co. v. Pittsburgh Construction Co., 55 L. Ed. 107; Charlotte & Northern R. R. Co. v. Wells, 67 L. Ed. 100."

In our opinion the word *compare* does no more than suggest reading and criticism.

While the Court did not decide whether the Act of June 25, 1930, validated the lien as to deposits made

before that time, the Court did hold that if the Act validated the lien as to deposits made after June 25, 1930, that such construction could only result from an application of the Rule of decisions in the cases mentioned. These cases mentioned are totally inapplicable.

The facts in the case of Gross v. United States Mortgage Co., 27 L. Ed. 795, are that on August 22, 1872, one Lombard borrowed $50,000.00 from a nonresident corporation; for the purpose of securing the indebtedness, Lombard gave to the Mortgage Company a mortgage covering property in Chicago; Lombard then conveyed the property in December, 1872 to the National Life Insurance Company, the Insurance Company agreeing to assume the Lombard mortgage in part payment of the purchase price. In part payment, too, the Insurance Company delivered to Lombard its note for $12,273.00, secured by a Deed of Trust covering the property. One Gross became the owner of the $12,-273.00 note and the Trust Deed. Lombard and the Insurance Company both became bankrupt. Apparently, under the laws of Illinois in force at the time the mortgage was executed, there was some question as to whether a corporation under the laws of another state could acquire title to real estate in Illinois as security for a loan and in 1875 the General Assembly of Illinois passed an Act that was clearly on its face intended to be retrospective in its operation, providing that a corporation of another state is authorized to lend money in Illinois. It was provided by the statute that "Any such corporation that may have invested or lent money

as aforesaid may have the same rights and powers for the recovery thereof, subject to the same penalties for usury as private persons and citizens of this State."

There was a default in the first mortgage given by Lombard to the mortgage company.

For the purpose of settling conflicting claims to the property, the assignee in bankruptcy of the Insurance Company brought a suit making the United States Mortgage Company, Gross and others defendants. There was involved, among other things, the question as to whether the holder of the first mortgage acquired a good title as against Gross, the holder of the second mortgage. It was conceded by all parties that the 1875 Act was retrospective, but Gross contended that he had acquired the title to the property prior to the enactment of the 1875 Act and that he had, therefore, acquired a vested right of property of which he could not be constitutionally deprived under the 14th Amendment. The Court held that the Act was not unconstitutional even though retrospective.

In the case now on appeal, there is no question as to the constitutionality of the Act of June 25, 1930. The question involved does not turn on the constitutionality of this statute, but the sole question involved is, should the statute be construed retrospectively so as to validate the previous pledge? The Act clearly discloses that no such retrospective construction was intended by the CONGRESS.

The facts in the case of West Side Belt Railroad Co. v. Pittsburgh Construction Co., 55 L. Ed. 107, are that

the plaintiff, a nonresident corporation, had not registered in the State of Pennsylvania, as required by the Statutes of Pennsylvania, as a condition precedent to doing business in that State, and the Court held that because of the plaintiff's failure to register, the plaintiff could not recover under its contract; thereafter a statute was passed by the Legislature of Pennsylvania validating contracts of this nature, the statute being a validating statute was retrospective on its face. The Court then sustained the contract on the strength of the validating statute.

In the case of Charlotte Harbor & Northern R. R. v. Wells, 67 L. Ed. 100, it appears that the Legislature undertook to validate previous action of county commissioners in creating a special road and bridge district lying partly in another road and bridge district. The Act was on its face retrospective.

Generally speaking, it may be said that all of the decisions mentioned for comparison as to the effect of the Amendment of June 25, 1930, upon balances on hand at that time show on their face that they were validating statutes intended to operate retrospectively.

Haynes v. City of Woodward, 6 F. Supp. 270, quoted in appellee's brief at page 11 presents a radically different situation. In that case practically all of the bonds were repledged after the passage of the amendment.

One outstanding feature of this case before the Court is that after all the National Banking Act is the expression of powers granted national banks and of

the intent of Congress as to their powers and regulation. This was pointed out very clearly in the case of Cook County National Bank v. United States, 107 U. S. 445, 448:

> "We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed; the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security and redemption of their notes, the winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

How much the Congress that passed the Amendment of June 25, 1930, knew about banking practices is hard to say, but this we do know: The Supreme Court in Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 258 said clearly:

"This amendment indicates that Congress believes that the original act had not granted general power to pledge assets to secure deposits. The fact that the amendment was made to Section 45 indicates that the power to pledge was granted only as an incident of the public officers duty to demand a pledge. If, as is suggested, the 1930 Amendment was passed merely in order to settle doubts as to the power of a National Bank to pledge its assets to secure deposits, the amendment would have been made, not to Section 45 but to Section 8 which contains the grant of incidental powers."

Senator Thomas, in introducing the bill, stated in the Senate:

"It is a bill simply to confer on a National Bank the same opportunity for the giving of security for the safe keeping and prompt payment of State and County moneys, as is authorized with reference to State banking institutions."

72 Cong. Record, 6243.

It has all the earmarks of an entirely new grant of power.

Appellee on page 14 of its brief states:

"The appellee rests its case upon the law as stated by the Supreme Court in Lewis vs. Fidelity & Deposit Co. of Maryland, supra:

"When that obstacle" (lack of power to give security) "was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties."

but appellee failed to finish the quotation, for the Supreme Court said:

> "When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the *lien became operative as to deposits thereafter made* and is entitled to priority from the date of the Act." (Italics mine.)

In Awotin v. Atlas Exchange Bank, 295 U. S. 209, it was held that one who makes an unlawful contract with a national bank is charged with knowledge of the statutory prohibition against such an agreement, and may not hold the bank to the forbidden contract on the ground of estoppel. In the course of the opinion the court states that contracts made by national banks in violation of statutes relating thereto are invalid, not merely on account of the absence of the power of the bank to enter into the same, but because there is a total prohibition of liability growing out of such a transaction, whatever its form, calling attention to the well-known rule *that national banks are public institutions, and the object of the statute is to protect their stockholders, depositors and the public from the hazards of contingent liabilities.* (Italics mine.)

In re Dearborn's Estate, 2 P. (2d) 93, the question of public policy centuries old was involved and the validation of a marriage by the removal of a previous disability is, as a matter of policy, of vital importance to the people. It is rooted and grounded in the common law. In the matter at bar the situation is decidedly dif-

ferent and to quote Awotin v. Atlas Exchange Bank (supra) the Supreme Court of the U. S. has said: "That national Banks are public institutions and the object of the statute is to protect the stockholders, depositors and the public from the hazards of contingent liabilities." It would be grossly unfair to the stockholders in a bank to have substantial blocks of assets set aside for the benefit of particular depositors for the depositor, generally speaking, would have no knowledge of this segregation of assets for the benefit of particular creditors and there is nothing in the record to indicate that the depositors in the instant case knew anything of this transaction.

Petterson v. Berry, 125 Fed. 902, involved the same principle as Ewel v. Daggs, the effect of repeal of a usury statute a penal statute without a saving clause. The repeal of a penal statute is vastly different in its effect from the enactment of a statute granting a new power to a national bank.

Appellee seems to have overlooked the meat of the decision in Wood v. Imperial Irrigation District, 17 Pac. (2d) 128. The opinion in that case is set out quite fully at pages 50, 51, 52 of appellant's brief. To refer to it briefly: A pledge of assets made by a bank in 1925, to secure funds of the Irrigation District was held by the Court to be illegal for lack of corporate power of the bank to make such a pledge. Two years later a statute was passed specifically authorizing exactly such pledges to such irrigation district, yet the court said that the passage of that statute did not validate the

hitherto illegal pledge. The situation was identical with the case at bar.

The case of Thompson, Rec. v. Twin Falls Highway District, a case decided in the southern district of Idaho on January 11, of this year is practically identical with our own case. In a well thought out opinion the Court held that the passage of the Act of June 25, 1930, did not validate a pledge previously made as to deposits made before the act. It is a clear cut case that clashes in no particular with the general run of Federal Court decisions.

In conclusion it is respectfully urged that had the Congress of the United States intended the Act of June 25, 1930, to act retroactively they would have so indicated and to hold that the Amendatory Act validated a pledge made in 1928 to secure deposits made in 1928 would be to give to the act a retroactive interpretation, nullifying vital provisions of the National Bank Act relating to distribution of assets of insolvent banks.

STEPHEN D. MONAHAN,
Attorney for Appellant.

No. 8412

United States

Circuit Court of Appeals

For the Ninth Circuit.

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership,

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8412

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index

NAMES AND ADDRESSES OF ATTORNEYS

TORREGANO & STARK, Esqrs.,
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S. F., Calif.,
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333 Montgomery St.,
S. F., Calif.,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed Jan. 22, 1935.

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 19830-L

GEORGE N. EDWARDS, as Receiver in Equity of Golden State Asparagus Company, a corporation,

Plaintiff,

vs.

HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE AND RICHARD ROE, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, and H. ROTHSTEIN & SON, a copartnership,

Defendants.

COMPLAINT FOR DAMAGES BREACH OF CONTRACT [1*]

Comes now the plaintiff above named and for cause of action against the defendants above named alleges as follows:

I.

That at all of the times herein mentioned GEORGE N. EDWARDS has been and now is the duly appointed, qualified and acting Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation, having heretofore been appointed by the above entitled court in an action pending in said court entitled: "American Can Company, a corporation, plaintiff, versus Golden State Asparagus Company, a corporation, defendant" and being numbered therein 2683-L.

II.

That the plaintiff herein is and at all times herein mentioned was a resident and citizen of the State of California. [2]

III.

That at all times herein mentioned H. ROTHSTEIN & SON was a copartnership consisting of HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE AND RICHARD ROE, doing business as such under the firm name and style aforesaid.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

IV.

That all of said copartners were and are citizens and residents of the State of Pennsylvania.

V.

That defendants herein, and each and all of them, are citizens and residents of the State of Pennsylvania.

VI.

That the true names of defendants sued herein under the fictitious names of JOHN DOE and RICHARD ROE are unknown to plaintiff at this time and plaintiff prays leave that when their said true names are ascertained the same may be inserted herein wherever proper.

VII.

That at all of the times herein mentioned plaintiff as such receiver has been engaged in the business of growing asparagus in the State of California and marketing said asparagus both in the State of California and throughout the United States.

That on or about the 13th day of February, 1934, at the City and County of San Francisco, State of California, plaintiff as such Receiver, and defendants above named, made and entered into a contract in writing, wherein and whereby plaintiff agreed to sell, and said defendants agreed to buy all of the bunch asparagus to be thereafter grown by plaintiff during the 1934 Season and up to and including April 10, 1934, at the price of $2.00 per

crate f.o.b. cars Isleton, California, [3] and whereby defendants agreed to furnish plaintiff with a good and sufficient bank guaranty covering and guaranteeing to plaintiff the payment of the aforesaid purchase price.

VIII.

That immediately after entering into said agreement, as aforesaid, and before plaintiff could or was required to perform the said contract and commence delivery of the said asparagus, defendants breached said contract in that they refused to furnish said bank guaranty in accordance with the contract and notified plaintiff that they would refuse to accept delivery of the asparagus in accordance with the terms of that contract.

IX.

That plaintiff at all times was ready, able and willing to perform the terms of said contract on his part to be performed.

X.

That during said 1934 season and during the term provided for in said contract plaintiff grew and there would have been available for delivery had said contract not been breached by said defendants as aforesaid, the total quantity of asparagus in the amount of 15,161 crates, for which plaintiff would have received under the contract, at the contract price thereof from defendants, the sum of $30,322.00.

XI.

That at the times said asparagus would have been ready for delivery in accordance with the said con-

tract there was an available market for the said goods and upon said market the market or current price for the said goods at the times when the same ought to have been accepted by defendants was in the total sum of $22,547.85; that by reason of the premises and foregoing facts plaintiff has been damaged in the sum of [4] $7,774.15, which is the loss directly, naturally and proximately resulting in the ordinary course of events from the defendants aforesaid breaches of said contract.

XII.

That jurisdiction of this case arises and is conferred upon this Honorable Court by reason of the diversity of citizenship of the parties hereto and that the amount in dispute exceeds the sum of $3,000.00 exclusive of costs and interest.

WHEREFORE, plaintiff prays judgment against defendants in the sum of $7,774.15, together with interest thereon at the legal rate from date of filing of this complaint, and his costs incurred herein; and for such other and further relief as is meet and proper in the premises.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff
333 Montgomery Street, 14th Floor,
San Francisco, California. [5]

United States of America,
State of California,
City and County of San Francisco.—ss.

GEORGE N. EDWARDS, being first duly sworn, deposes and says: that he is the Receiver in Equity of the Golden State Asparagus Company, a corporation, plaintiff in the foregoing proceeding; that he has read the foregoing Complaint and knows the contents thereof; that the same are true of his own knowledge, except as to the matters which are therein stated on information or belief, and that as to those matters, he believes them to be true.

GEORGE N. EDWARDS

Subscribed and sworn to before me this 19th day of January, 1935.

[Seal] MARK E. LEVY

Notary Public in and for the City and County of San Francisco, State of California. [6]

[Endorsed]: Filed Feb. 21, 1935.

Receipt of a copy of the within Answer is hereby admitted this 20th day of February, 1935.

DINKELSPIEL & DINKELSPIEL

[Title of Court and Cause.]

ANSWER.

Now come HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN and H. ROTH-

STEIN & SON, a copartnership, the defend- [7] ants above-named, and by way of answer to plaintiff's complaint, admit, deny and allege as follows:

I.

Admit all of the allegations contained in paragraphs I. and II.

II.

Answering paragraph III, admit that during all of the times herein mentioned H. Rothstein & Son was a copartnership consisting of Henry Rothstein, M. H. Rothstein and I. Rothstein, but deny that John Doe and Richard Roe or either of them are members of said copartnership.

III.

Answering paragraph IV, admit that the copartners above-named were and are citizens and residents of the State of Pennsylvania.

IV.

Answering paragraph V, admit that the defendants Henry Rothstein, M. H. Rothstein and I. Rothstein are citizens and residents of the State of Pennsylvania.

V.

Deny generally and specifically each and every allegation contained in paragraphs VII, VIII, IX, X, XI and XII.

As a second separate and distinct defense defendants allege as follows: [8]

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI and XII, defendants deny generally and specifically each and every material allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 13, 1934, the plaintiff offered to sell to defendants all asparagus shipped from Golden State Asparagus Company up to and including April 10, 1934, at Two ($2.00) Dollars per crate FOB Isleton, providing that a satisfactory bank guarantee was given immediately and that all drafts against shipments would be paid. That no satisfactory bank guarantee was ever given by defendants.

As a third separate and distinct defense defendants allege as follows:

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI, and XII, defendants deny generally and specifically

each and every [9] material allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 13, 1934, plaintiff and defendants entered into negotiations with reference to the purchase by defendants of all the asparagus shipped from the Golden State Asparagus Company up to and including April 10, 1934. That as a result of said negotiations plaintiff and defendants agreed to enter into a written contract of sale of said asparagus by plaintiff to defendants. That no written contract was ever tendered by plaintiff or by anyone acting on plaintiff's behalf or otherwise to defendants.

As a fourth separate and distinct defense defendants allege as follows:

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI and XII, defendants deny generally and specifically each and every allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 13, 1934, plaintiff and defendants entered into negotiations with reference to the purchase by defendants of all aspara-

gus to be shipped from the Golden State Asparagus Company up to and including April 10, 1934. That as a result of said negotiations plaintiff and [10] defendants agreed to enter into a written contract of sale of said asparagus by plaintiff to defendants. That at the time plaintiff and defendants met for the purpose of drawing said written contract, plaintiff and defendants were unable to agree upon the terms to be set forth in said written contract. That as a result of being unable to agree upon the terms to be contained in said written contract, plaintiff and defendants agreed to abandon further negotiations for the sale of said asparagus by plaintiff to defendants.

As a fifth separate and distinct defense defendants allege as follows:

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI and XII, defendants deny generally and specifically each and every material allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 14, 1934, defendants offered to purchase from plaintiff all bunch asparagus shipped from Golden State As-

paragus Company up to and including April 10, 1934, and defendants offered to arrange a guarantee of payment therefor. That said offer of defendants [11] was never accepted by plaintiff.

WHEREFORE, defendants pray that plaintiff take nothing by way of his complaint, and that defendants have judgment for costs incurred herein.

ERNEST J. TORREGANO
TORREGANO & STARK
Attorneys for Defendants [12]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

ERNEST J. TORREGANO, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants named and described in the foregoing answer; that he knows the contents thereof and hereby makes solemn oath that the statements therein contained are true according to his best knowledge, information and belief.

That the reason why the verification to said answer is not made by the defendants or either of them is because said defendants do not reside within the jurisdiction of the above-entitled court, nor have any office in the City and County of San Francisco. That affiant is duly authorized to make this verification for and on behalf of said defendants.

ERNEST J. TORREGANO

Subscribed and sworn to before me this 20th day of February, 1935.

[Seal] CHARLES E. REITH

Notary Public in and for the City and County of San Francisco, State of California. [13]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19830-L.

GEORGE N. EDWARDS, as Receiver in Equity of Golden State Asparagus Company, a corporation,

Plaintiff,

vs.

HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE and RICHARD ROE, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, and H. ROTHSTEIN & SON, a copartnership,

Defendants.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 23rd day of October, 1935, being a day in the July 1935 Term of said Court, before the Court and a Jury of twelve men duly impaneled and sworn to try the issues joined herein; Martin J. Dinkel-

spiel and David K. Lener, Esquires, appearing as attorneys for plaintiff, and Ernest J. Torregano and M. C. Symonds, Esquires, appearing as attorneys for defendants, and the trial having been proceeded with on the 24th, 25th, 29th, 30th and 31st days of October and 1st day of November, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the Jury, find in favor of the Plaintiff and asses the damage against the Defendants in the sum of seven thousand five hundred four dollars and two cents. ($7504.02/100) Dollars. Edward H. Clark, Jr., Foreman,", and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

NOW, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that George N. Edwards, as Receiver in Equity of Golden State Asparagus Company, a corporation, plaintiff, do have and recover of and from Henry Rothstein, M. H. Rothstein, I. Rothstein, John Doe and Richard Roe, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership, defendants, together with his costs herein expended taxed at $58.35.

Judgment entered this 1st day of November, 1935.

WALTER B. MALING,
Clerk. [14]

[Endorsed]: Filed Dec. 11, 1936.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on regularly for trial before the Honorable Harold Louderback, Judge of the District Court of the United States for the Northern District of California, sitting with a jury, on the 23rd day of October, 1935, Messrs. Dinkelspiel & Dinkelspiel and David K. Lener appearing as counsel for the plaintiffs, and Messrs. Torregano & Stark and M. C. Symonds appearing as counsel for the defendants Henry Rothstein, M. H. Rothstein, I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership; that the following proceedings were had, orders and exceptions hereinafter appearing, had and taken therein, the following be- [15] ing the testimony and evidence offered or introduced on the trial of this cause, to-wit:

(After impaneling of the jury).

Thereupon counsel for the defendants requested leave of the court to amend the answer of the de-

fendants on file herein to insert therein the word "bunch" after the word "all" in line 26, page 5, of said answer, which request was granted.

Counsel for the plaintiff thereupon offered in evidence a certified copy of the order of the above entitled court, dated September 5, 1930, in the matter of "American Can Company, a corporation, plaintiff, vs. Golden State Asparagus Company, a corporation, defendant," No. 2683-L, in equity, amongst the records of the above entitled court, appointing George N. Edwards as receiver of the Golden State Asparagus Company, a corporation, which certified copy was received in evidence and marked Plaintiff's Exhibit No. 1. Said order authorized the receiver to take possession and control of all of the property, assets and effects of the Golden State Asparagus Company and to do all and any things and enter into all and any agreements as may be deemed by the receiver necessary or advisable to preserve the property or assets.

The receiver was further authorized and empowered to institute, prosecute or defend or intervene in or become party to any such proceedings at law or in equity, including ancillary proceedings, as may, in his judgment, be necessary and proper for the protection and preservation of the assets of the Golden State Asparagus Company and also to collect, settle or otherwise dispose of any and all suits, actions or proceedings then pending in any court by or against the said Golden State Asparagus Company as in the judgment of said receiver may

seem [16] advisable or proper for the protection of its assets; to settle with, compromise, collect from or make allowance to its debtors; to enter into such arrangements, compositions, extensions or otherwise with its debtors as the receiver may deem advisable; and generally said receiver was authorized to do all acts, enter into any agreement and acts, adopt and approve any or all contracts as may be deemed necessary or advisable for the protection and preservation of the assets of the Golden State Asparagus Company. The receiver was given leave to apply for such further and other orders as may to him from time to time seem advisable and necessary in the administration of the estate.

Testimony of GEORGE N. EDWARDS as Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a Corporation, in his own behalf.

GEORGE N. EDWARDS,

as receiver in equity of Golden State Asparagus Company, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By MARTIN J. DINKELSPIEL:

The WITNESS: That in the months of January and February, 1934, and up to the present time he was receiver of the Golden State Asparagus Company, whose principal business is that of farming; that its lands are located in Sacramento County on Sherman Island, Brannan Island and Andrus Island. That in the month of February, 1934, about

(Testimony of George N. Edwards.)

six hundred acres of this [17] land was under cultivation in asparagus. That he had a meeting with M. H. Rothstein about the 10th day of February, 1934, at Isleton, California, which is on the Sacramento River on Andrus Island; that Ben Krasnow was present; that Krasnow was acting as representative for Mr. Rothstein on the Coast; that a discussion was had at said meeting concerning the sale of asparagus.

Mr. DINKELSPIEL: Will you relate as closely as you can what was said by Mr. Rothstein, by Mr. Krasnow and by yourself in connection with the sale and purchase by Mr. Rothstein's firm of the asparagus purchased by the Golden State Asparagus Company.

Mr. TORREGANO: Objection.

(Discussion)

The COURT: Overruled.

Mr. TORREGANO: Exception.

The WITNESS: At the request of Mr. Krasnow he met Mr. Rothstein by himself at Isleton about February 10, 1934. Mr. Rothstein said he wished to purchase his asparagus. He told Rothstein that he was not particularly interested in selling at that time because he had about completed arrangements for shipping it, and Rothstein remarked that he wanted the asparagus and generally got whatever he wanted. He told Rothstein that if he was willing to meet his terms he could get it all right. They discussed the general details of the shipments, the asparagus to be picked and how it was to be shipped.

(Testimony of George N. Edwards.)

Everything was satisfactory as to what type and grade of asparagus was to be shipped, how it was picked and loaded on the cars, who was to pack it, etc. Rothstein said he was satisfied with this arrangement. He asked Rothstein $2.00 a crate F.O.B. cars Isleton. Rothstein wanted a few days [18] to consider that factor. Rothstein said he was going to Seattle, Washington, and he gave Rothstein forty-eight hours in which to accept or decline the price, and within that time Mr. Krasnow, his representative, telephoned and said they would accept all he had to ship between the first of the season to the 10th of April, 1934, at that price. That at the conversation at Isleton he told Mr. Rothstein that if he sold him the asparagus they would have to give a satisfactory bank guarantee to assure payment would be made for all of the asparagus that was shipped upon delivery of the documents to them or their representative, which Rothstein said would be done. He told Rothstein he was acting as receiver and could not take any responsibility on that score. Whatever asparagus was shipped he had to make arrangements for to be paid. That at this conversation just bunch asparagus was to be shipped. That he had been engaged in farming operations, and in particular in connection with the raising and planting and growing of asparagus about twenty years. That in selling the term "bunch asparagus" is used and that it was a common term in the market during twenty years he had been operating. Bunch asparagus as used on the market is asparagus

(Testimony of George N. Edwards.)

with spears of fairly tight heads and a certain amount of length of greenness on the stalk supposed to be about eight or nine inches and green on the stalk and this is put in bunches with a press and tied with a ribbon. There is a small size and crooked spears that won't go in bunches and is not shipped east. Rothstein said he expected to ship the asparagus east.

Krasnow telephoned and told him that Rothstein had wired him that he would accept his offer for the asparagus and pay the price asked and would make satisfactory bank arrangements. [19] Krasnow asked him to wire Rothstein in Seattle confirming the sale, which he did.

Whereupon, Mr. Dinkelspiel requested Mr. Torregano to produce the original telegram addressed to M. H. Rothstein, Washington Athletic Club, Seattle, Washington, dated February 12, 1934, signed Geo. N. Edwards, Receiver, Golden States Corp. Co., which telegram was produced.

Mr. TORREGANO: We admit the telegram was received.

Whereupon the telegram was offered and received in evidence as plaintiff's Exhibit No. 2, and read to the jury as follows:

Western Union Telegram addressed to M. H. Rothstein, Washington Athletic Club, Seattle, Washington, February 12, 1934:

> "Will confirm sale to H Rothstein and Son all asparagus shipped from Golden State Asparagus Co up to and including Apr 10 34 $2

(Testimony of George N. Edwards.)

per crate fob cars Isleton providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid wire answer 801 Jones Avenue Oakland

Geo N Edwards Receiver

Golden State Asp. Co."

The WITNESS: In answer he received a Western Union Telegram on or about February 13, 1934.

Mr. DINKELSPIEL: We will offer this telegram, dated February 13, 1934, addressed to Golden State Corp. Co., 801 Jones Avenue, Oakland, California, signed M. H. Rothstein, from Seattle, Washington, in evidence as Plaintiff's Number 3.

Mr. TORREGANO: We object to that, if the Court please, on [20] the ground that it does not conform to the allegations set forth in the complaint.

The COURT: You are not objecting on the ground that this is not the original telegram?

Mr. TORREGANO: No, your Honor.

The COURT: Or it wasn't received?

Mr. TORREGANO: No.

The COURT: By the receiver and sent by the sender.

Mr. TORREGANO: We are not objecting there.

The COURT: But only on the ground you have just specified?

Mr. TORREGANO: Yes.

The COURT: The objection will be overruled, and it will be received as Plaintiff's Exhibit Number 3.

(Testimony of George N. Edwards.)

Mr. TORREGANO: Exception.

Mr. DINKELSPIEL: This is a telegram on a Western Union form, dated February 13, 1934, Seattle, Washington, addressed to the Golden State Asparagus Co., 801 Jones Avenue, Oakland, California. (Reading)

PLAINTIFF'S EXHIBIT No. 3.

"Answering will arrange guarantee payments all bunch asparagus price mentioned expect return San Francisco last this week or first next week don't worry when we make deal with you will go through with same can draw up contract my arrival meantime figuring deal confirmed

M. H. ROTHSTEIN"

The attention of the witness was thereupon called to a telegram from Ben Krasnow, dated February 19, 1934. The witness identified the telegram as having been received by him from Krasnow; thereupon the telegram was offered in evidence by plaintiff, received and marked

PLAINTIFF'S EXHIBIT No. 4. [21]

"G. N. Edwards,
Care Attorneys Dinkelspiel and Dinkelspiel
Pacific National Bank Building
San Francisco, California

We missed five fifteen train leaving on seven twenty train this morning will arrive at attorneys office eleven oclock

BEN KRASNOW."

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Q. After the receipt of the wire of February 13, 1934, from Mr. Rothstein, did you believe as far as you were concerned you were bound under that obligation to deliver your asparagus to Mr. Rothstein on his furnishing you with a satisfactory guarantee.

The WITNESS: I did.

Mr. TORREGANO: Just a minute. I object——

Mr. DINKELSPIEL: I will stipulate the answer may go out.

The COURT: Probably the best way to do is to consider the objection made prior to the answer and see whether it will be stricken out after hearing the objection.

Mr. TORREGANO: We object to the question on the ground that it calls for the conclusion and opinion of the witness and is something for the Court and jury.

The COURT: There is no harm in hearing either one of them state he thought he made a contract or not. In other words, that doesn't pass upon the legality of a contract, but his attitude in connection with the testimony he is giving. I see no objection to that, because it is his personal attitude. I will allow it to stay in the record.

The WITNESS: That he met Rothstein and Krasnow at Dinkelspiel's office on the 19th of February, 1934. Mr. Martin Dinkelspiel was present. Rothstein said "what are we here for." He told

(Testimony of George N. Edwards.)

Rothstein he wanted to arrange for the bank guarantee. [22] Dinkelspiel asked how much was involved and he estimated about twenty thousand crates which would involve $40,000. Dinkelspiel suggested Rothstein furnish a bank irrevocable letter of credit for $40,000 and Rothstein objected strenuously. Rothstein said "my bank will think I am crazy. We buy millions of dollars worth of goods out here every year and don't put up any guarantee." He told Rothstein that was part of their arrangement and Rothstein said he would arrange it for him. Then Mr. Dinkelspiel said if he did not want to put up a letter of credit, but if his reputable bank in Philadelphia would guarantee the payments of the drafts as we presented the documents that would be satisfactory, but Rothstein would not agree to that, said he would not make any such arrangement, that they had been buying goods all over the country and never made this arrangement.

That during the entire conversation Rothstein refused to make any satisfactory financing guarantee. Since that day Rothstein has not offered a satisfactory bank guarantee, that Rothstein never made or offered any financing guarantee except the ordinary credit of his company; that as a result of the refusal of Rothstein and the firm of H. Rothstein & Son to furnish the guarantee or bank guarantee no asparagus was shipped them during the year 1934. During the season of 1934, up to April 10th he shipped 15,161 crates of bunch asparagus.

(Testimony of George N. Edwards.)

The total price received F.O.B. Isleton was $22,-547.85. If the asparagus had been sold at $2.00 a crate $30,322.00 would have been received. The difference between $22,547.85 and $30,322.00 is the amount claimed as damages suffered.

Whereupon plaintiff rested.

Mr. TORREGANO: If your Honor please, befor proceeding [23] I again desire to move to strike out all of the witness' testimony in regard to the asparagus which was being sold, the method of payment and to whom sold and by whom sold, upon the ground that those two contracts, or those two telegrams are the best evidence, and that those two telegrams cannot be supplemented by any parole evidence which would tend to incorporate therein any of the essential terms of those two telegrams.

The COURT: I think you had better make all the motions you wish. First, you are making a motion to strike as I understand it.

Mr. TORREGANO: To strike out all of the witness' testimony in regard to those two contracts and the terms contained therein upon the ground that those telegrams contain all of the writings passing between the two parties, the plaintiff on one side and the defendants on the other side. At this time, if your Honor please, to substantiate that motion——

The COURT: Is there any other motion you care to make? Let us have all the motions together.

Mr. TORREGANO: Then, your Honor, the plaintiff having rested, I move the jury be instructed to render a verdict in favor of the defendant.

The COURT: In other words, you are asking for a directed verdict at this time?

Mr. TORREGANO: Yes, on the ground that it appears that the plaintiff has not sustained the allegations in his complaint to the effect that the defendant and plaintiff have entered into a contract which calls for enforcement by this Court—that the evidence solely discloses they had some preliminary negotiations—that such contract was not entered into. [24]

Whereupon prior to argument upon the motions made by counsel for the defendants Mr. Dinkelspiel requested permission of the court to reopen plaintiff's case by recalling Mr. Edwards, which request was granted.

GEORGE N. EDWARDS
(Recalled)

Mr. DINKELSPIEL: Q. Mr. Edwards, directing your attention to the conversation testified to this morning at Isleton at that time between yourself and Mr. Rothstein, Mr. Krasnow being present, about the 10th of February, 1934, was anything said by you or Mr. Rothstein or both of you as to the type or kind of asparagus that was to be the subject matter of this sale?

(Testimony of George N. Edwards.)

Mr. TORREGANO: I will object, of your Honor please, on the ground it is incompetent, irrelevant and immaterial; that the writing introduced in evidence is the best evidence of the final consummation of any negotiations or conversation.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

The WITNESS: He told Rothstein that he would ship the same quality of asparagus that was shipped to Rothstein through H. P. Garin & Co. in 1931 and 2. Rothstein said that was the quality they wanted; that the kind of asparagus shipped through Garin was bunched asparagus,—shipping—so far as he knew, and no other type of asparagus was shipped to the eastern market. Rothstein said it was to be shipped to the eastern market—Atlantic Seaboard.

Mr. DINKELSPIEL: Q. Is there any difference between shipping asparagus and bunch asparagus?

Mr. TORREGANO: We object to that, if your Honor please, on the ground it calls for the conclusion and opinion of the [25] witness, and no foundation has been laid, and on the further ground it is incompetent, irrelevant and immaterial, and that any description of asparagus has been reduced to writing and the writing is the best evidence.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

The WITNESS: No, nothing was said in the conversation about his communicating with Roth-

(Testimony of George N. Edwards.)

stein, except that Rothstein was to let him know whetheh he was willing to stand the price that he had offered the asparagus at.

Mr. DINKELSPIEL: If you had offered the price, why did you send him a telegram?

The WITNESS: Well, his agent asked me to confirm the transaction. The telegram was sent at the request of Krasnow. He told Rothstein that he wanted five cents a pound for the shipping asparagus—bunch asparagus—there is fifty—thirty pounds in a crate. That would be one-fifty a crate plus fifty cents for packing and just bunching it and loading it on board the cars, and supplying the crate. That is how he arrived at the price of two dollars a crate.

Mr. TORREGANO: I again renew my objection and move to strike out the answer on the ground it tends to vary the terms of a written contract sued on here, is incompetent, irrelevant and immaterial, and not the best evidence; that such agreement must be in writing pursuant to the laws of this state.

The COURT: Read the question, Mr. Reporter.

(Question read)

The COURT: The motion to strike will be denied.

Mr. TORREGANO: Exception.

The WITNESS: As far as he knew there is only bunch asparagus shipped along the Atlantic Seaboard, some of it gets into the Middle West occasionally.

(Testimony of George N. Edwards.)

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The WITNESS: Well, his agent asked me to confirm the transaction. The telegram was sent at the request of Krasnow. He told Rothstein that he wanted five cents a pound for the shipping asparagus—bunch asparagus—there is fifty—thirty pounds in a crate. That would be one-fifty a crate plus fifty cents for packing and just bunching it and loading it on board the cars, and supplying the crate. That is how he arrived at the price of two dollars a crate.

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The COURT: Read the question, Mr. Reporter.

(Question read)

The COURT: The motion to strike will be denied.

Mr. TORREGANO: Exception.

The WITNESS: As far as he knew there is only bunch asparagus shipped along the Atlantic Seaboard, some of it gets into the Middle West occasionally.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I move to strike it out as incompetent, [26] irrelevant and immaterial, and that it is not binding on the defendants herein, the nature—— [27]

The COURT: Motion to strike will be denied.

Mr. TORREGANO: Exception.

Mr. DINKELSPIEL: You recall testifying to a conversation that took place in my office on the 19th of February, 1934, in which Mr. Rothstein, Mr. Krasnow, myself, and yourself were present. Was any reference in the conversation at that time had by either you or Mr. Krasnow in connection with bunch asparagus?

Mr. TORREGANO: I object on the ground that the contract is the best evidence.

The COURT: I don't recall whether that is supposed to be——

Mr. DINKELSPIEL: It was subsequent to the contract, your Honor, and the purpose is to show at that time the parties still had understood the terms that was the subject matter of the contract. In other words, a subsequent ratification of the supposedly misunderstood term is as good as a prior complete understanding.

The COURT: You take it as a ratification?

Mr. DINKELSPIEL: Yes, your Honor.

Mr. TORREGANO: I do not agree to that.

The COURT: I don't know what was said. I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: Yes.

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Will you state just what was said at that time?

Mr. TORREGANO: We object to that on the ground it calls for the conclusion and opinion of the witness; secondly on the ground that any conversation or statement made at that time is supplemental to the written contract sued on here. [28]

The COURT: I think we have a right to have the exact language if he remembers it, and if he can't give it, give it in substance. I will sustain the objection as to the form.

Mr. DINKELSPIEL: I will reframe the question and ask you to state, if you can, just exactly what was said in that conversation by Mr. Rothstein, yourself or anyone else in that meeting.

Mr. TORREGANO: I object to that on the ground the contract is the best evidence.

The COURT: Objection to the reception of the testimony overruled.

Mr. TORREGANO: Exception.

The WITNESS: Mr. Dinkelspiel asked how many crates of asparagus he would have and he told him probably twenty-three or twenty-four thousand crates, but there would be only about twenty thousand of bunch asparagus. Rothstein said he would be interested simply in the bunch pack.

Loose pack asparagus is not the type referred to in the Garin contract. The conversation with Rothstein at Isleton was with reference to only bunch asparagus.

(Testimony of George N. Edwards.)

Cross Examination

(By Mr. Torregano)

The WITNESS: He displayed the two telegrams (Plaintiff's Exhibits 2 and 3) to Dinkelspiel & Dinkelspiel, his attorneys, and instructed them to draw up a contract and submit it to Rothstein for his signature. Dinkelspiel told him he drew up a contract, he does not recall whether such a contract was exhibited to him and Rothstein in Dinkelspiel's office. [29]

Mr. TORREGANO: I now call for the production of the contract.

Mr. DINKELSPIEL: I have not got it, because Mr. Rothstein walked out before any contract could be submitted.

The WITNESS: He does not recall whether there was more than one contract drawn up by Dinkelspiel based on this telegram. They never really got to that point because Rothstein refused to put up the guaranty and there was no use of going any further. He does not know whether Dinkelspiel submitted it to Rothstein. He gave Mr. Dinkelspiel the two telegrams and suggested he draw up a contract in conformity with the agreement embodied in the telegrams. He does not know whether Dinkelspiel actually drew it up or not. He does not believe he saw it. At the conference in Dinkelspiel's office he told Rothstein that he wanted a memorandum of this arrangement because he was receiver and wanted something in the record to show what the transaction was if any question

(Testimony of George N. Edwards.)

came up later on as to how much he received for the asparagus, etc., he wanted a memorandum or contract to show what the contract was. He told Dinkelspiel he wanted inserted in the contract exactly what arrangement they made at Isleton, the kind of asparagus to be shipped—bunched asparagus—how it was to be paid for and arrangements for guarantee of the payment.

The COURT: Do you believe the entire agreement between yourself and Mr. Rothstein was embodied in the contract?

The WITNESS: I do.

Mr. TORREGANO: I object as calling for a conclusion and opinion of the witness.

The WITNESS: I considered that we had made a sale.

The COURT: In other words, you considered the documents constituted an agreement between you two?

The WITNESS: Yes. [30]

The COURT: And when you gave it to Mr. Dinkelspiel did you suggest other terms besides those you thought you had agreed upon should be inserted in the agreement?

The WITNESS: No. [31]

Mr. TORREGANO: We move to strike that out on the ground it is incompetent, irrelevant and immaterial.

The COURT: I want to know just what the witness is testifying, and the motion to strike.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I don't want the record confused.

The COURT: Will be denied.

Mr. TORREGANO: I will have to cite your Honor for——

The COURT: Let the record show the statement of counsel. The Court has only one object, not being a party to either side. It is immaterial to me whether your client wins or Mr. Dinkelspiel's client wins. Proceed.

The WITNESS: He simply told Dinkelspiel he had sold this asparagus to Rothstein in accordance with the arrangement made up at Isleton, and he simply wanted a memorandum of the agreement or an arrangement whereby payment would be guaranteed. All he wanted was to be sure that he would receive payment for the asparagus. It was the only object he had in mind. He said the only way they knew of to guarantee these payments was to furnish a letter of credit on a reputable bank in the East guaranteeing his bank that the documents would be honored upon presentation. At the time he had the conversation with Rothstein at Isleton he told him definitely in substance the same thing.

Mr. TORREGANO: What did you tell Mr. Rothstein at Isleton about how the deal was to be financed?

The WITNESS: I told Mr. Rothstein in Isleton that before the deal was made—that an agreement would have to be made that was satisfactory to my attorney assuring payments would be met as the goods were shipped.

(Testimony of George N. Edwards.)

He did not tell Rothstein at Isleton or in Dinkelspiel's office that he had to put up any deposit; he did not recall or was not sure [32] whether he used the words "bank guarantee" when he had his discussion with Rothstein at Isleton. As far as he recalled he had to be given a guarantee that the payments would be met during the entire shipping period, he told Rothstein he was looking for guarantees over and above the credit of his company.

At the conference in Dinkelspiel's office the subject of putting up a surety company bond was discussed and a telegram was dictated in Mr. Dinkelspiel's office in the morning and sent by Rothstein to his Philadelphia office.

Whereupon the following telegram was offered and received in evidence as

DEFENDANTS' EXHIBIT No. 1,

and read to the jury as follows:

"February 19, 1934.

M. Rothstein & Son,
Dock and Granite Streets,
Philadelphia, Pennsylvania.

Necessary place five thousand dollar faithful performance bond with Edwards receiver Golden State Asparagus Company Stop Notify your surety company have their San Francisco agent write bond and communicate with Martin Dinkelspiel Golden States attorney.

M. H. ROTHSTEIN."

(Testimony of George N. Edwards.)

The WITNESS: The subject matter of the surety bond was again discussed in the afternoon. Rothstein wanted to put up a $5,000 surety bond. He wanted a $10,000 bond and offered to pay the cost of the additional premium. In the morning he told Rothstein that to conform with his requirements of a satisfactory bank guarantee he wanted the bank to guarantee that drafts up to the amount of $40,000 would be paid as the goods were shipped and documents delivered to Mr. Rothstein's representative. Rothstein said he could not or would not do that. He offered him nothing after that and told Mr. Dinkelspiel as far as he was concerned that he wanted assurance that drafts would be paid and he told Rothstein that if there was any other arrangement that [33] could be made it was satisfactory as he was commencing to ship asparagus then and had cancelled the arrangements to ship the asparagus to other sources. [34]

Then they commenced to discuss the question about the bond and does not know or recall if they arrived at the amount of money. When it came to the question of the bond the question involved there was what the value of the asparagus being shipped every two or three days would amount to. He does not recall they ever agreed to any bond or an amount. He left the question of accepting the surety bond to Dinkelspiel. As far as he was concerned any arrangement that would guarantee the payment when the goods were shipped was all

(Testimony of George N. Edwards.)

he wanted. He understands that there are other classes of asparagus than bunch asparagus.

When he used the words "all asparagus" in his telegram (Plaintiff's Exhibit No. 2) he meant all shipping asparagus. Shipping asparagus and bunch asparagus is practically the same thing as far as the trade is concerned. Shipping asparagus and bunch asparagus is all the asparagus shipped back east. Possibly ten or fifteen per cent of the asparagus grown by the Golden State Asparagus Co. is culls. Shipping of bunch asparagus would involve a less number of crates than if all of the asparagus were shipped. In Dinkelspiel's office they talked about the bank guarantee to guarantee the payment of the shipments. The discussion in the afternoon was not very long, he thinks it was about the type of bond Dinkelspiel wanted to guarantee these payments and at the conclusion Rothstein said that if he was not willing to take his word for it the deal was off. He got in touch with Rothstein at Isleton through Krasnow, who got in touch with him, and that Krasnow told him Rothstein was out here from the East and that they would like to buy the asparagus and wanted to meet him up there on that particular day. At Isleton he discussed with Rothstein the specifications of the bunch asparagus, it was to be the same asparagus that had been shipped him through Garin and passed the State Department of Agriculture specifications. He does not know the federal specifications. [35]

(Testimony of George N. Edwards.)

The asparagus he intended to sell Rothstein he shipped East to various dealers, commission men. In order to make up carload shipments you generally work through jobbers. Roper and Company we call a jobber. He did not sell the merchandise to Roper, the asparagus was consigned through Roper, through H. Roper and Company, Commission Merchants. Roper makes a loading charge and a commission. The receiver, on the other end deducts the entire commission and expenses and pays Roper and sends him the account sales. He had the merchandise packed in different grades and sizes, part was bunched and part loose asparagus. Roper sold the asparagus through brokers or commission men. They are all the same. Right after Rothstein's deal fell through he went to Roper and told him he wanted to have the deal taken care of by him; before he saw Rothstein he had made all arrangements to ship the asparagus and when Rothstein agreed [36] to buy it he cancelled the arrangement. He thought he tried to sell the asparagus to other people.

In discussing the matter of posting the bank guarantee with Rothstein, he told him that he wanted the bank guarantee so that he would be *procted* as receiver of the estate. He has been a grower of asparagus for 20 years. He first grew asparagus in the vicinity of Suisun it was about 300 acres. The canning business is his business and he has dealt in asparagus all these years. Asparagus sold for canning purposes does not necessarily bring a less

(Testimony of George N. Edwards.)

amount than that sold for bunch asparagus. It depends on the market condition entirely. There is a custom and usage among the asparagus trade in regard to the entry into a contract for sale and purchase of asparagus.

It is not customary to write out a contract providing the manner of payment for the asparagus, grade of the asparagus, location, number of acres, approximate number of carloads to be shipped, manner of shipment, whether or not asparagus is free and clear of any lien and date of payment. He has not seen any contracts that contain those requirements, most of the business is done by wire. He has seen the expression "satisfactory bank guarantee" used in the trade.

A satisfactory bank guarantee can be arranged as follows:

A responsible bank in the east will wire out to his bank that they will honor all drafts against a particular party back there who is a customer up to a certain amount of money when the documents are presented. The amount to be shipped is estimated. We estimated shipping $40,000 worth of asparagus during the period covered in this sale and that is what we asked for. The $40,000 of asparagus was to be shipped from Brannan Island at Isleton. There was no other Island in addition to Brannan Island which was planted by the Receiver to asparagus belonging to the Golden State Asparagus Co. There was no asparagus in 1934 on [37]

(Testimony of George N. Edwards.)

Andrus Island, nor on Sherman Island. He is sure about that. Another way to meet the requirement of a satisfactory bank guarantee would be for the buyer of asparagus to furnish an irrevocable letter of credit to his bank permitting them to make payments as shipments and documents were turned over to them. Those are the only two ways he knows to give a satisfactory bank guarantee. He had not communicated to Rothstein that that was his understanding as to how a satisfactory bank guarantee could be accomplished. At the time he ascertained he would have to sell the asparagus to someone else than Rothstein he ascertained that he could get more at that particular time by shipping it than from the canneries.

At Isleton he told Rothstein he would have to commence shipping asparagus at any time and that if they entered into a contract Rothstein would pay him $2.00 a crate and he would give Rothstein the returns on the cars shipped. At the time the proposition was discussed at Isleton, the season was right on them, and he told Rothstein he may have to commence shipping asparagus any time, and Rothstein wanted a couple of days to consider the matter as to whether or not he would accept the price and he said if in the meantime Edwards had to ship any asparagus before the deal was completed to go ahead and ship it, and that early asparagus generally brings seven or eight cents a pound and that he would pay Edwards $2.00 a crate and that he would

(Testimony of George N. Edwards.)

give him whatever the returns were on those crates shipped prior to shipping to him.

Redirect Examination.

By Mr. DINKELSPIEL:

The WITNESS: Roper is purely a shipper. The culls are shipped through him to a local market. Within a short time after they met at Mr. Dinkelspiel's office Rothstein told him that he would not furnish a bank guarantee. At the meeting on the 19th day of February both kinds of guarantees were called to Rothstein's attention. Rothstein was asked if he had any other type of bank [38] guarantee to suggest; he did not suggest any bank guarantee. He refused to give any bank guarantee. After his refusal to furnish the bank guarantee Edwards told Mr. Dinkelspiel if he wouldn't put up the bank guarantee if there was any other arrangement that could be secured in payment of these shipments it would be satisfactory to him, as he had already started to ship asparagus. At the conference in Dinkelspiel's office he told Rothstein he had already started to ship asparagus and if there was any possible way in which he could be assured of payment for the shipments he would be satisfied. The green or bunch asparagus season begins about the middle of February ordinarily, and lasts until the first to the tenth day of April. The same amount of asparagus is not shipped every day. There are periods during the time between the 15th day of February,

(Testimony of George N. Edwards.)

to the 10th day of April, when larger or lesser quantities find their way to the market. The volume of shipment increases toward the latter end of it, and the main purpose in calling for a guarantee was to protect these large shipments. He thinks there is a law against culls being bunch packer. They usually are loose packed, dumped in shipping crates. Bunch packed are those tied up with small ribbons. As distinguished from the fresh market or green shipping asparagus period, the canning period ordinarily starts in California the 10th day of April. He at no time told Rothstein that he would accept $5000 surety bond as a satisfactory guaranty. [39] Rothstein at no time said he would give a $5,000 surety bond. Rothstein left Dinkelspiel's office about 12 o'clock and said he would be back at one-thirty. As he recalls they waited about 2 hours; it was between three and three-thirty when Rothstein returned. The afternoon conference lasted about 15 minutes. At the conference on the afternoon of February 19th Rothstein said he would not put up any security for the payment of the drafts, that he bought millions of dollars worth *or* produce all over the United States and did it largely over the telephone or by telegraph and if they were not willing to accept his credi*to* he would call the deal off. The terms "bunched grass" and "green shipping grass" as used by the trade are synonymous. Bunch asparagus is not less than three-eighths inches in diameter, nine inches long, six to seven inches of

(Testimony of George N. Edwards.)

green on the stalk, fairly close heads, no crooked or seeded heads or crooked spears or seeded heads, packed in crates. There might be a technical difference in opinion as to what is meant by "all asparagus." If there are any culls in the boxes they are segregated. You pay for bunch asparagus. The cullls are used locally. You can't afford to ship them, the value is so low.

Recross Examination.

By Mr. TORREGANO:

The WITNESS: In some instances during the time he has been receiver he has obtained the order of the court approving the sale of asparagus. He has had this property since starting with the harvest of thirty-one and he has sold it every year. He sells the cannery asparagus which involves twice as much money as this every year without the approval of the court, and in only one instance he secured the approval of the court and this is where the crop mortgage was involved and he had to get a court order to make the mortgage good. [40] He did not state to Rothstein that he did not want a surety company bond at the time the telegram was dictated (Defendants' Exhibit No. 1). He is quite sure he heard the telegram dictated in his presence. He does not know when the telegram was sent. There was no telegram sent during the fifteen minute conference in the afternoon. At the conference in Dinkelspiel's office Rothstein declined to put up a bank

(Testimony of George N. Edwards.)

guarantee. He said he would not go on with the deal unless he took his credit. Rothstein said at that time that he would not put up a surety bond. In the course of the conference Rothstein said that as drafts would be presented against the shipments his bank would honor the drafts. He told Rothstein that what he was after was protection on the end of a shipment and he wanted a guarantee put up so he wouldn't run out if the market broke, and that is what he wanted it for. He told Rothstein that if he was doing business with a reliable bank and his bank would guarantee that Rothstein's draft would be paid alright, or if he didn't want to do that, if he would put up an irrevocable letter of credit to be used as shipments were made that would be satisfactory. At Isleton he told Rothstein that the only asparagus he was growing was on Brannan Island. He told Rothstein he wanted some guarantee besides Rothstein's word that the drafts would be paid as presented. After Rothstein refused to put up the kind of security he wanted Rothstein said he would wire his office to see whether he could get a bond or not, that all he would put up was a $5,000 bond. He used the words "all asparagus" in the offer in his telegram (Plaintiff's Exhibit No. 2) because at the time he previously sold asparagus to Garin, Rothstein, they bought the asparagus delivered to their packing shed at a certain price per pound and they packed it out themselves and did [41] the bunching and grading themselves, and in discuss-

(Testimony of George N. Edwards.)

ing the present transaction at Isleton it was understood he was going to do the bunching and packing himself and it would be the same quality shipped Rothstein before under the Garin contract. In asking Dinkelspiel to draw up a contract he told him that was the understanding with Rothstein and that was to be inserted in the contract Rothstein was to sign. When Rothstein left Dinkelspiel's office in the morning he sent this telegram to see whether he could get a bond or not and Mr. Dinkelspiel thought it was a compromise measure, and that something might be worked out with a letter of credit. As he recalled he telephoned to his secretary at his hotel or to somebody to send the wire. He was going to come back after lunch at 1:30 and let him know whether he could get the bond, and when Rothstein came back he said he decided not to go ahead with the deal; that they were not going to put up anything; that unless Edwards was willing to take their credit the deal was off. He does not recall ever exhibiting the form of the written contract to Rothstein; he thinks he requested Dinkelspiel to draw up a contract in accordance with the two telegrams (plaintiff's exhibits 2 and 3). The telegram simply used trade words. He told Dinkelspiel he wanted a contract drawn up covering the points mentioned in the two telegrams and did not give Dinkelspiel any other instructions.

Mr. TORREGANO: But you did not disclose to him that you had any discussion with Mr. Rothstein

(Testimony of George N. Edwards.)

with regard to any other points involved in the transaction that what was in the telegram? Is that correct?

The WITNESS: Yes. His third report and account as receiver filed on September 21, 1934, does not mention having entered into a contract with Rothstein. He had no discussion with Rothstein as to the different lengths of stalks in the bunch asparagus. [42]

Redirect Examination

By Mr. DINKELSPIEL:

The WITNESS: Price of asparagus is not dependent on the grades whether they are mammoth or colossal, or other different classifications that go to make an asparagus crop. He would like to elaborate a bit on that answer to the effect that when a price is made by a commission merchant for an entire crop there is no differentiation as a rule between the sizes, in other words, as asparagus gets older it gets smaller, there is less of the larger size, and a crop that would contain a certain proportion of the large size might be bought for four cents a pound whereas a crop that contained a large percentage of the smaller size would be bought for three cents a pound. Krasnow was familiar with and had seen the acreage and plants about ten days prior to the time Rothstein came out to the coast, prior to the time he met him in Isleton, which was about

(Testimony of George N. Edwards.)
the tenth of February. Krasnow had seen this acreage about February 1st. He saw it flooded, which meant that he would have unusually early asparagus. Krasnow had seen the place in thirty-two, thirty-three and nineteen thirty four. In fact in thirty one and thirty two he was the man who packed the asparagus shipped to Garin.

Whereupon plaintiff rested.

Thereupon the court denied the motion of defendants to strike out all the witness' testimony in regard to the two telegrams (Plaintiff's exhibits 2 and 3). The motion was made upon the ground that the telegrams contained all the writings passing between the two parties, and also denied the motion of the defendants that the jury be instructed to render a verdict in favor of the defendants. The motion was made upon the ground that it appeared that the plaintiff had not sustained the allegations in his complaint to the effect that the defendants and plaintiff entered into a contract; that the evidence solely [43] disclosed that the parties merely had some preliminary negotiations.

Testimony of

H. P. GARIN

H. P. Garin, called as a witness for the defendants, having first been duly sworn, testified as follows:

(Testimony of H. P. Garin.)

Direct Examination

By Mr. TORREGANO:

The WITNESS: That for about thirty years he has been engaged in the produce business, farming and shipping vegetables, and is familiar with the custom and usage generally prevailing in the asparagus industry. In a contract between a grower and buyer of asparagus, according to trade custom and usage, the provisions customarily required to be inserted in the contract are the grade, classification and quality in either white or green asparagus, U. S. 1, or according to State inspection, the manner of payment, if you are shipping F.O.B. you draw a draft on the buyer. If you are afraid he won't pay you you ask him for a bank guarantee; that in that case you furnish him the inspection and bill of lading or shipping order and ask him to give you —wire him for the guarantee for the amount of your draft and take that bill of lading or shipping order and your inspection, over to the bank and get your money, or if you don't do it that way you just ship it on open draft if you know the man and he pays the draft when it gets there, or in some cases airmails a check for it, the location where the asparagus is grown, the approximate number of acres, the method of shipment, [44] provisions as to pooled cars, whether the asparagus is being sold free and clear of encumbrances and limiting the dates of shipment. Every once in a while they ask

(Testimony of H. P. Garin.)

in a contract that a "satisfactory bank guarantee" be put up. He has entered into contracts in which that was one of the conditions appertaining to the sale.

The COURT: Just say what the term means without going into other details not being asked for. What do you understand that where that appears in a contract?

The WITNESS: A sufficient guarantee — it would mean——

The COURT: Satisfactory guarantee?

The WITNESS: Yes.

The COURT: Bank guarantee?

The WITNESS: A man puts up either certain guarantee that—with a bank to fulfill his contract and then makes a draft on him for every—that is as a deposit like, you see. That is the way we do it. We make them put up a deposit, a guarantee or bond or something we know in case——

The COURT: You call them all bank guarantees?

The WITNESS: It is——

The COURT: Just say yes or no. Do you call them all bank guarantees?

The WITNESS: It is the same—a letter of credit.

The COURT: That is, what you call a bank guarantee where they put up a bond?

The WITNESS: Bond—they put up a bond with a bank and the bank sometimes guarantees it.

(Testimony of H. P. Garin.)

The COURT: The bank assumes, then, the responsibility that drafts will be drawn against said account, isn't that correct?

The WITNESS: Yes.

The COURT: Your speaking of the bond merely goes to the fact that banks might execute that for its own protection but does [45] the bank actually guarantee the drafts will be honored?

The WITNESS: That is true, but on a great many occasions a man puts up a bond and then you draw on him, the bond guarantees either the bank or us against—if he goes back on the contract.

The COURT: If the bond ran to you and not the bank you wouldn't classify that as a bank guarantee would you?

The WITNESS: No, I wouldn't.

Mr. TORREGANO: But if the bond was put up for the performance of a contract and that in addition to the arrangements were made with the bank to take up each and every draft would that come under the term satisfactory bank guarantee?

The WITNESS: Yes. A satisfactory bank guarantee is where a man puts a certain guarantee with a bank to fulfill his contract and then makes a draft for every shipment, or where a letter of credit is given, or a bond guaranteeing either the seller or the bank if the buyer goes back on the contract. [46]

According to custom and usage in the asparagus trade there is a difference between the terms "all asparagus" and "all bunch asparagus." There is

(Testimony of H. P. Garin.)

a loose pack of asparagus, and a bunch pack, and six grades of bunch pack. The extra fancy, colossal, jumbo, extra fancy and fancy, and select and extra select, they come under bunch grass. He has known the firm of H. Rothstein & Son for some time and has dealt with them as an eastern representative for many years and is still dealing with them. He has dealt with them during this present year.

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: The grade of the asparagus is always specified in the contract. All contracts that the firm of H. P. Garin enter into specify whether they are buying bunch asparagus or not. In 1931 and 32 he purchased from Edwards, as receiver, both bunched and loose asparagus. Green merchantable shipping asparagus would be the same as bunch asparagus if it was up to grade. All their contracts with individual farmer-growers provide against liens, we would not use that in dealing with firms. The requirements against liens and encumbrances from the farmer-grower is our own requirement for our own protection. He has seen other contracts containing the provision because he has made his contracts exchanging other people's contracts, also cannery contracts; all of them did not have that provision.

Testimony of

WALTER S. MARKHAM

Walter P. Markham, called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. TORREGANO:

The WITNESS: That for twenty years he has been in the shipping and brokerage business, distribution of vegetables. He [47] has resided in Salinas since May, 1934, and in California since June, 1929. He first became engaged in the business in Oklahoma as a salesman, credit manager, and assistant buyer, he was connected with H. P. Garin & Co. at San Francisco for five years. He was really Mr. Garin's right-hand man. Garin did not make any major purchases of asparagus, or any other commodity, without consulting him. Before he came to California he had contracts with growers of asparagus. He did not close any deals in California prior to coming to California. He bought lots of asparagus in California prior to coming to California. His usual practice of communicating with the growers was by telegraph. Occasionally by telephone. The growers would usually wire him. It was usually an exchange of wires. He purchased some produce for H. P. Garin & Co., mostly loaded cars. When he needed a carload he would contact a jobber or commission house, and fill in his order from their stock. He did not contact growers in that connection, and by reason of

(Testimony of Walter S. Markham.)

his experience is familiar with the trade custom and usage as it pertained to the asparagus industry.

In a contract entered into for the sale of asparagus, and according to trade custom and usage, the provisions customarily inserted are: the location of the commodity being sold, point of delivery, what packing shed is to be used, the grade, time and method of shipment and manner of payment. The dates of shipment are important because the price fluctuates, because of Eastern competition with California asparagus; Carolina, Georgia, New Jersey, and other producing districts interfere with the consumption. They come into competition with California grass at certain times so all contracts he has ever seen on asparagus specify the dates of shipment from and to including certain dates. The contract should contain the grade of asparagus because of the wide variation in packs and grades.

[48]

The term "satisfactory bank guarantee" is customarily used in preliminary negotiations for a sale in the asparagus business.

Mr. TORREGANO: Will you state as to whether or not the term "satisfactory bank guarantee" has a definite meaning amongst the custom and usage of the trade of asparagus as to how the bank guarantee payment is to be ultimately made?

Mr. DINKELSPIEL: Objection.

The COURT: Let's ask the question and be through with it, how is it understood in the trade when used in the preliminary negotiations—as meaning what?

(Testimony of Walter S. Markham.)

The WITNESS: That the—it is understood that the purchaser from that wording there that you have just referred to—satisfactory bank guarantee—that the purchaser is willing to make the proper or satisfactory method of payment to suit the seller. That's what I gather from it, Judge.

Mr. TORREGANO: When you say "what you gather"—is that the way the term is used as negotions go on between people that buy and sell asparagus? Is that the way the term "satisfactory bank guarantee" is used by people who buy and sell asparagus?

The WITNESS: Your Honor——

Mr. TORREGANO: Is that your answer?

The WITNESS: No, my answer is bank guarantee means one thing——

The COURT: I am only asking one thing and see how you can answer. You have testified here as I understand the record that the term "satisfactory bank guarantee" in connection with preliminary negotiations is a term that is used by people who are buying and selling asparagus.

The WITNESS: Yes, sir.

Mr. TERREGANO: When they use that term is it understood among the trade as representing a certain thought? It is, isn't it? [49]

The WITNESS: Yes.

Mr. TORREGANO: There is no difference of opinion on it?

The WITNESS: No.

Mr. TORREGANO: What does the trade, as you understand the custom, as you understand in

(Testimony of Walter S. Markham.)

the preliminary negotiation, understand this word to mean when used in connection with the purchase of asparagus?

The WITNESS: The purchaser will secure or give the seller a satisfactory bank guarantee.

Mr. TORREGANO: Of course, those are the words themselves?

The WITNESS: A satisfactory method of payment then.

Mr. TORREGANO: Satisfactory to who?

The WITNESS: To the seller and the buyer in the contract.

Mr. TORREGANO: Make a satisfactory——

The WITNESS: It must be satisfactory to both parties.

Mr. TORREGANO: You are beginning to argue. You are not supposed to be an authority on it. But you are being placed here to show what they would understand. If a man says he will give a satisfactory bank guarantee it means he will give one satisfactory to the person he guarantees to give it to—correct?

The WITNESS: Yes.

Mr. TORREGANO: And he leaves it open to interpret that to suit himself? Leave it to him.

The COURT: I am asking him the question, and not Mr. Torregano.

Mr. TORREGANO: But I am protecting my record.

The COURT: Object?

Mr. TORREGANO: Yes.

(Testimony of Walter S. Markham.)

The COURT: Overruled.

Mr. TORREGANO: I note an exception.

The WITNESS: The purchaser lays himself open to reasonable [50] qualifications to satisfy the buyer that the guarantee——

The COURT: The only limitations is what you term "reasonable limitations"?

The WITNESS: That is all, yes, sir.

The COURT: Proceed.

Mr. TORREGANO: Would a letter of credit be a reasonable limitation?

The WITNESS: Yes, sir.

Mr. TORREGANO: Would the deposit by the purchaser——

The WITNESS: On the contract——

The COURT: Wait a——

The WITNESS: There must be a meeting of minds Judge.

The COURT: You are not being asked about a contract, but what this term means when used preliminary. Once it is in a contract it has a different status. Then you have a point where you are not looking for the custom of the trade, but the legal responsibility. It is what the understanding would be in the trade, of such a trade, before they have actually consummated the contract.

The WITNESS: Yes.

The COURT: Have you answered fully as to that in your answer to me or do you wish to add further?

(Testimony of Walter S. Markham.)

The WITNESS: I don't want to take up any unnecessary time, but there are different methods of buying that I think have not been explained.

The COURT: The point is those terms don't mean any more than what you have said to people who negotiate with them without defining them any further do they?

The WITNESS: Yes, sir, they do.

All right. Then they do mean more than you said? You said "reasonable". Now what does it mean to everybody dealing in the trade? [51]

The WITNESS: A bank guarantee means——

Mr. TORREGANO: Go ahead—satisfactory bank guarantee?

The WITNESS: A bank guarantee means the transfer of monies or the guarantee of the purchaser's bank to the seller's bank the amount of the invoice covering that particular shipment. That is the meaning of a bank guarantee, and the method of handling it.

The COURT: Those are two methods understood under that expression, bank guarantee.

The WITNESS: Yes. If you want to ask any more——

The COURT: I am not asking any more. Proceed.

Mr. TORREGANO: Under the term "satisfactory bank guarantee" it is not required in the trade to furnish a bond in behalf of the grower or seller?

The WITNESS: Your Honor——

(Testimony of Walter S. Markham.)

Mr. TORREGANO: Is it required?

The WITNESS: I don't know what the seller is going to require.

Mr. TORREGANO: In the trade, though, may he require that?

The WITNESS: Yes, sir; the seller may require that a bond be put up to guarantee.

Mr. TORREGANO: In other words, under the customs of the trade, he would have a right to do it?

The WITNESS: A perfect right, yes.

Mr. TORREGANO: And under the trade custom and usage, may the buyer put up a bond and also arrange for his bank to meet the drafts for each car as they are shipped?

The WITNESS: Yes.

The COURT: He has gone at great length to show the custom in the trade. In other words, there is a custom in the trade?

The WITNESS: Yes. [52]

Mr. TORREGANO: And it is also a custom in the trade in meeting that term "satisfactory bank guarantee" by arranging for the deposit of a certain percentage of the purchase price in cash and also arrange with the bank to meet the drafts as they're presented?

The WITNESS: Yes.

The COURT: This all follows the use of the expression "providing a satisfactory bank guarantee", is that correct?

The WITNESS: Yes.

The COURT: In the trade?

(Testimony of Walter S. Markham.)

The WITNESS: Yes. Your Honor, just a minute. You asked me a while ago——

The COURT: Do you want to explain something you have already testified to?

The WITNESS: Yes.

The COURT: Well, if it's pertinent to your testimony, proceed.

The WITNESS: You asked me to make this method of payment as brief as possible and I put it in about eight or ten words there. Now, there are other methods.

The COURT: I said brief, but also said complete. I don't say by your brevity to leave out any thought.

The WITNESS: I did.

The COURT: Tell us what you left out.

The WITNESS: There is the bank guarantee for one—a letter of credit too. A deposit in a local bank or a bank close enough to satisfy the seller when an agent can give the seller a check for the shipment on receipt of the bill of lading and Federal inspection and invoice. One more——

The COURT: Go ahead.

The WITNESS: Or a bond to see that the contract is ful- [53] filled—that they carry out their agreement, see. Put it in escrow—a bond—to see that the purchaser fulfills his contract and against the documents as the shipments are made then draw a draft on each individual shipment. The purchaser's bank wires the seller's bank that they will honor the draft covering this shipment upon receipt of

(Testimony of Walter S. Markham.)

papers, car numbers and papers. Those are the four methods.

The COURT: You have testified that the seller could exact within reason any of these methods, is that correct?

The WITNESS: Yes.

The COURT: And the buyer then wouldn't have the discretion to offer any one of these unless the seller approved it? Is that your testimony? Or are you testifying the buyer has a right to offer any of those to the seller?

The WITNESS: The buyer to the seller.

The COURT: Just the reverse from what you said. It isn't the seller that can exact this, but the buyer who can elect to take any one of those methods under those terms?

The WITNESS: Yes.

Mr. TORREGANO: As I understand from your testimony, both the buyer and the seller must agree on the terms, is that correct?

The WITNESS: Yes.

Mr. TORREGANO: In the event that a percentage of the purchase price is required by the seller, what in your opinion according to the general custom and usage of the asparagus trade would that percentage be of the total amount involved?

The WITNESS: Ten per cent.

Mr. TORREGANO: In a contract involving say $35,000 or $40,000 for the sale of asparagus what amount of bond would you say the buyer would be required to put up in addition to making an ar-

(Testimony of Walter S. Markham.)

rangement with his bank to meet each individual draft as the car rolls, [54] under the trade custom, as applied to satisfactory bank guarantee?

Mr. DINKELSPIEL: I object to the question on the ground that no proper foundation has been laid.

(Discussion)

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

The WITNESS: It is customarily ten per cent.

The COURT: To clear up your testimony. After you had testified—first you probably erroneously testified from your statement that the seller has a right to exact certain things at his option, then on my pointing out you probably meant the buyer you said the buyer had a right to exact certain things. Now, on top of that, Mr. Torregano asked you a question as to whether it wouldn't have to be agreed between them subsequently and you said yes. Do you now testify that those terms mean nothing until they had agreed later which one they would follow, or do you mean the seller making a preliminary contract could give any one of those four methods?

Mr. TORREGANO: I object as compound.

The COURT: The point is if the witness understands.

Mr. TORREGANO: Exception.

The WITNESS: When you first put the question to me—brevity—and I didn't get the complete explanation of it, see, and it was a case as I said to condense it in as few words as possible. That's

(Testimony of Walter S. Markham.)

what you wanted me to do. The seller has a right to demand what he wants. The purchaser has a right to demand what he is going to pay—how he is going to do it.

The COURT: I am not talking about payments.

The WITNESS: We are talking about four methods.

The COURT: You have characterized your testimony by brevity. [55]

The COURT: When those terms are used do I understand that you thought there must be a subsequent understanding between the parties to make them effective—or according to the trade now—that the purchaser can elect to offer to the seller any one of those four methods that you specify?

The WITNESS: That's a very hard question to answer, your Honor.

The COURT: You can't answer it, is that it?

The WITNESS: Yes, I can.

The COURT: Answer it.

The WITNESS: Depending upon the anxiety of the buyer or purchaser who may do more than he would ordinarily in the manner of meeting the seller's terms—the anxiety of the seller may conform to the purchaser's idea and stretch a point as to how he will accept payment.

The COURT: I don't see that's an answer to the question. I am asking you something definite. The terms being used, and not asking anybody to make any concession at all—or anybody who urg-

(Testimony of Walter S. Markham.)

ently needs to make a contract. I am asking you when these terms are used in the preliminary agreement whether that is to be understood in the trade that the purchaser can offer subsequently to the seller any one of those four methods of financing to satisfy that expression in the trade, or do you feel that that would have to be subsequently embodied in a new arrangement between them before they could become effective—between the parties? Do you understand?

The WITNESS: Yes.

The COURT: Mr. Torregano asked you a question along that line; and I wanted to clear it up.

The WITNESS: Yes, sir, I understand. It is customary for the seller to designate how the payment—how the shipments shall be paid for. That is the custom. Does that answer your question?

The COURT: Well, I won't go into that. I am satisfied to let [56] the record stand.

Mr. TORREGANO: It doesn't answer me.

The WITNESS: I answered Judge——

Mr. TORREGANO: What the court wanted you to answer is this; in a contract or preliminary negotiations containing the term "satisfatcory bank guarantee" is that term so definite that nothing is required to be done between the buyer and seller to determine how the satisfactory bank guarantee shall be evidenced?

The WITNESS: No.

Mr. TORREGANO: That there is something further to be done, is that correct?

The WITNESS: Yes.

(Testimony of Walter S. Markham.)

Mr. TORREGANO: You say where there may be four different ways, usually used for the financing it is not done as yet and must be still subject to further negotiation? Is that your testimony?

The WITNESS: Every deal, Judge——

The COURT: Answer the question?

The WITNESS: Yes.

Mr. TORREGANO: And you were about to explain that answer. Will you please explain the answer.

The COURT: I don't think it needs explaining.

Mr. TORREGANO: But you desire to explain the answer "yes" that you gave. If you have any explanation I want you to proceed.

The WITNESS: Yes, my explanation is, every deal is a separate transaction, and the terms or method of payment is usually determined by that particular deal and all in a contract or on a standard confirmation of sale, which is necessary in this line of business, and that is the reason I answered as I did. [57]

A contract with the phrase in it "all bunch asparagus would not meet the requirements of the custom and usage of the trade so as to specify the grade and kind of asparagus. The term "bunch asparagus" according to trade custom and usage in the trade means generally asparagus of sufficient quality to justify bunching, packed in containers with certain sized dimensions, with minimums as to size. It is a very broad statement. The term

(Testimony of Walter S. Markham.)

"all asparagus" according to custom and usage in the trade means everything produced, culls, crooks, seeded heads, anything that could be cannery asparagus or loose asparagus or bunch asparagus. There was a market for bunch asparagus in New York between February 13, 1934 and April 30, 1934, and a market for bunch asparagus in Philadelphia between February 21, 1934, to April 29, 1934.

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: Shipping asparagus is asparagus suitable for eastern shipment. He has never seen a standard contract form in the asparagus trade that growers and buyers sign. His experience is largely limited to contracts that are written by H. P. Garin & Co., they are taken from contracts of other shippers, or other growers, they kind of rehash them and take what they think is best. They are purely H. P. Garin contracts. He knows H. P. Garin & Co. had a contract in 1931 and 1932 with George N. Edwards. That contract had some special features due to the nature of it, being a receivership, there was some special cash settlement in it if he remembers correctly. That asparagus was purchased on a pound basis packed by H. P. Garin & Co. and Rothstein—that is under their supervision at Isleton. The Garin contract of 1931-2 with the plaintiff called for all straight suitable asparagus without broken tips, suitable for shipping. It was not bunch asparagus. Bunch asparagus is

(Testimony of Walter S. Markham.)

asparagus with straight spears, good caps and not [58] bruised or spread beyond certain degree. The degree is determined by the shed foreman or the representative of the purchaser or if in cases where grade stipulations are required, such as U. S. One Grade, there is a tolerance or percent that will be allowed. Then the asparagus must be three-eighths of an inch in diameter, at a minimum of three-eighths of an inch. That any larger constitutes bunch asparagus tied in bunches with ribbons for shipping East. There would still be some good grades that could be shipped loose. Some culls are shipped loose, depending on the market. The words "field run" means everything in the field. You subtract the bunch pack in the field and everything left is culls. He has done business with H. Rothstein & Son. From his experience the price of asparagus usually drops in the Eastern market along the latter part of March, and the forepart of April, as compared to February. He has done business with Rothstein & Son since he has been in Salinas. Since he sold out he hasn't done any business with Rothstein & Son because they have their own representative in Salinas. He did business with Rothstein & Son as late as January of this year. He is familiar with what is commonly known as "the green asparagus season". That is, from the time grass is first cut in the early part of the year, usually in February until along in April, and then it is commonly termed the "canning grass". As a general rule more of it is moved out of California

(Testimony of Walter S. Markham.)
during the latter part of that period, the latter part is the time when the peak shipments are reached, and this is the time when California grass starts to come into competition with Eastern asparagus. From his experience the price of asparagus usually drops in the Eastern market along the latter part of March, and the forepart of April, as compared to February. He *have* never personally purchased an entire crop of asparagus for shipment East from any grower in the Sacramento delta, for any firm that he was working with. [59]

Testimony of

JAMES C. HARLAN

James C. Harlan, called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. TORREGANO:

The WITNESS: That he is employed by the Department of Agriculture of the State of California.

Whereupon the witness produced a letter written to the Department of Agriculture by Messrs. Dinkelspiel & Dinkelspiel, dated April 26, 1934, which letter was offered and received in evidence and marked

(Testimony of James C. Harlan.)

DEFENDANTS' EXHIBIT NO. 2,

as follows:

"April 26, 1934

C. J. Carey, Esq.,
Chief of Division
Department of Agriculture,
Sacramento, California

My dear Carey:

Before filing any formal complaint in accordance with the data sent us in your letter of April 19th, the facts on which we might file a complaint are briefly as follows. We are giving them to you for the purpose of ascertaining whether or not they would come within the purview of the Department's jurisdiction.

On or about the 15th of February pursuant to certain conversations had between a client of ours, a California grower of asparagus, an eastern house through its local representative entered into a verbal understanding in regard to the purchase of the entire green asparagus crop up to April 10th of our client. A partner of this eastern firm was in the West at the time although not in California. Our client wired him to his then address setting forth the terms of the sale and providing that the buyer would have to supply a satisfactory bank guarantee to the seller, our client. A wire came back agreeing to the terms of the sale, stating that as soon as he arrived in San Francisco a satisfac-

(Testimony of James C. Harlan.)

tory bank guarantee would be forthcoming and that the terms of the agreement could be reduced to a written contract. We then met with our client and the buyer and did reduce the agreement to writing but that same day the buyer refused to put up a bank guarantee and walked out on the contract and refused to accept the asparagus. Our client thereafter consigned the asparagus and suffered, by reason of an over supply during the early portion of the asparagus season, a loss estimated at this time of approximately $18,000.00. [60]

In your opinion would these facts bring the complaint within the purview of Chapter 12, Section 1268, of the Act and permit action to be taken by the Department for the revocation of the dealer's license to do business in California. We understand that this firm not only does business as a dealer buying for their own account but also as a commission merchant. Also would it permit of action on the bond? We would appreciate any information you might give us in this connection.

We are, with kindest personal regards,

Very truly yours,

DINKELSPIEL & DINKELSPIEL

By MARTIN J. DINKELSPIEL."

Testimony of

MAXWELL H. ROTHSTEIN

in his own behalf.

Maxwell H. Rothstein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. TORREGANO:

The WITNESS: He resides in Philadelphia and is a member of the firm of H. Rothstein & Son, which consists also of Henry Rothstein and I. Rothstein. The firm has been in business for over thirty years and is engaged in the wholesale fruit and produce business. Over the last ten years the firm averages between one and two million dollars per year. He and Krasnow met Edwards in the latter part of January in Edwards' office in Oakland. They next met Edwards at Isleton on February 8, 1934. Edwards asked $2.25 per crate for the asparagus. He told he was not interested at that price and that when Edwards named a price in line with the market, to get in touch with Krasnow. He did not see or hear from Edwards until the telegram (plaintiff's Exhibit No. 2) received in Seattle, Washington on the 13th of February, 1934. He noticed the words "all asparagus" in the telegram and replied by telegram he wanted "all bunch asparagus" (plaintiff's [61] Exhibit No. 3) He meant by "all bunch asparagus" asparagus nine inches in length at least five inches green or more. As a

(Testimony of Maxwell H. Rothstein.)

matter of fact, they always name in their contracts six to seven inches green as the eastern market do not take white asparagus at desirable prices, and he figured Edwards and he could work those stipulations out when they were together. During his conversation with Edwards, both in Ookland and at Isleton, no discussion was had as to the phrase "all bunch asparagus" nor as to the phrase "all asparagus." In accordance with custom and usage of the trade he understood the term "all asparagus" to mean all the asparagus grown and delivered as the grower sees fit. He did not interpret the use of the words "all asparagus" in Edwards' telegram (plaintiff's Exhibit No. 2) for anything. He thought he would clear himself by answering the wire as he did (plaintiff's Exhibit No. 3). The term "bunch asparagus" has no definite meaning in the asparagus trade. He tried to explain it before there are different kinds of bunch asparagus. Some shippers pack it two pounds to a bunch and some two and a half to three quarters pounds. In accordance with custom and usage of the trade a person purchasing bunch asparagus arranges to have the bunch asparagus graded before he enters into the final contract. When he used the words "don't worry, when we make deal will go through with same" in his telegram (plaintiff's Exhibit No. 3) he meant when the deal is consummated by contract they would go through with same.

(Testimony of Maxwell H. Rothstein.)

Pursuant to the two telegrams (plaintiff's Exhibits Nos. 2 and 3) Krasnow and himself met Edward and Dinkelspiel in Dinkelspiel's office in San Francisco on February 19, 1934. Dinkelspiel said "let's talk about this asparagus contract" and commenced reading a paper. Dinkelspiel said it was a contract. As Dinkelspiel read from the contract he objected to many paragraphs. His objection to the contract was that there was considerable work to be done that was not in the contract. He did not tell [62] Dinkelspiel exactly what he wanted because he did not have an opportunity to sit down and define what he wanted put in the contract. The main discussion was as to how the deal was going to be financed. He stated that he was going to pay by bank guarantee, meaning H. Rothstein & Son would place a bond as a deposit.

Whereupon the telegram (Defendants' Exhibit No. 1) was shown to the witness, who testified that the telegram was sent by him from Dinkelspiel's office to Philadelphia. Edwards stated that he could not understand what he meant by bank guarantee and he told Edwards that in his business it meant that you wire a bank guarantee as to the payment of a draft against the shipment. Edwards stated, suppose you only take the first shipments of asparagus, it would place him at a disadvantage. He told Edwards they were going to place a $5,000 surety bond to remain until the contract was fulfilled and as shipments were made they would wire

(Testimony of Maxwell H. Rothstein.)

the funds on receipt of advice of the shipments. That is the way they had done it for years.

Whereupon, copies of drafts and letters of credit having the name of Corn Exchange National Bank, Philadelphia Trust Company and the Market Street National Bank of Philadelphia, and reading as follows, were shown to the witness:

DEFENDANTS' EXHIBIT A.

"No. A550 Philadelphia, ...19.....

To the Corn Exchange National Bank & Trust Co.

Philadelphia, Pa.

We will honor, if presented to you on or before ....., 19....., draft drawn by..... through....., in the amount of..... ..... Dollars, $..... for cars Nos..... ..... shipped ..... containing ..... providing presented with following documents attached: Individual drafts for each car, with shipper's invoice and original bill of lading, also stamped diversion order showing car rolling open to H. Rothstein & Son. Federal Certificate showing car U. S. No. 1.

We authorize payment on first presentation only

H. ROTHSTEIN & SON

....."

[63]

(Testimony of Maxwell H. Rothstein.)

"Car No..... No. 50
Shipped.....

Individual drafts with shipper's invoice and original bill of lading attached. Also stamped diversion order showing cars rolling open to H. Rothstein & Son, Philadelphia, Pa. U. S. No. 1 Certificate.

Remarks..... Philadelphia.....
Pay To the Order of Draft Drawn by.....
..... $..... Dollars.
To The Corn Exchange National
Bank and Trust Co. H. ROTHSTEIN & SON
Philadelphia, Pa. ....."

"The Philadelphia National Bank No. 506
Philadelphia, Pa.

Dear Sirs: Philadelphia....., 193...

Please open by day letter / wire / night letter an irrevocable letter of credit covering the following terms:
in favor of.....
Through .....
Car No. and Commodity.....File No.....
Date Shipped..... To Expire.....
Draft in the amount of $..... to be presented with shipper's invoice and original Bill of Lading attached: Also stamped diversion

(Testimony of Maxwell H. Rothstein.)

order showing car rolling to H. Rothstein & Son, Phila., Pa.

Other attachments: .....

We will execute your usual form of obligation for this credit when presented to us.

H. ROTHSTEIN & SON

$..... .....''

"Drawer..... No. 452.

Car No.....

Shipped.....

Shipper's invoice and original bill of lading attached also stamped diversion order showing car rolling to H. Rothstein & Son, Philadelphia, Pa. [64]

Remarks..... Philadelphia.....

Pay to the Order of.....$.....

.....

H. ROTHSTEIN & SON

.....

To
The Market Street
National Bank
Philadelphia, Pa.'' [65]

Mr. TORREGANO: I call your attention to forms ..... printed matter of H. Rothstein & Son, having the name of Corn Exchange National Bank, Philadelphia Trust Company and the Market Street

(Testimony of Maxwell H. Rothstein.)

National Bank of Philadelphia, Pennsylvania, and ask you if those are forms used by your bank for the purpose of honoring such drafts you discussed with Mr. Edwards when presented?

The WITNESS: Yes.

Mr. DINKELSPIEL: I object to the question, if the Court please, and ask the answer go out, on the ground there is no proper foundation laid. It has not been shown these or similar documents were ever shown to the plaintiff by the defendants.

The COURT: Objection sustained. It will go out.

Mr. TORREGANO: We offer for identification, if your Honor please, these documents, and we take an exception to the ruling of the Court refusing to permit us to show by the witness his arrangement with the bank whereby he was to honor drafts as issued against him.

The COURT: Received as Exhibit A for Identification. Defendants' exhibit.

(Discussion)

Mr. TORREGANO: In order for you to understand my presentation I merely state to your Honor I make the offer for the purpose of showing—for having the record to show what I propose to prove upon the testimony as I offer it which your Honor ruled was inadmissible.

(Discussion) [66]

(Testimony of Maxwell H. Rothstein.)

Mr. TORREGANO: I now offer in evidence, after having made the offer, the documents introduced for identification as Defendants' Exhibit A.

Mr. DINKELSPIEL: Does that mean they are offered as exhibits?

Mr. TORREGANO: It is being offered in evidence as part of the witness' testimony.

Mr. DINKELSPIEL: Then I will object on the grounds heretofore stated, that no proper foundation has been laid.

The COURT: Same ruling.

Mr. TORREGANO: Exception.

The WITNESS: When he made the statement to Edwards that he would put up a surety bond to honor the drafts as the invoices would be presented to his bank, that was his understanding of the language used by him in his telegram (Plaintiff's Exhibit No. 3) that he would guarantee payment. At the time Dinkelspiel was reading the contract to him, no description of the asparagus was contained in it. He did not read it entirely. He told Dinkelspiel that he was not interested in the paper or the contract being read. Dinkelspiel used the words "all asparagus" in reading the contract to him at the conference held in Dinkelspiel's office. He objected to it and told Dinkelspiel he was not interested in buying all asparagus. He told Dinkelspiel he wanted to buy bunch asparagus. Dinkelspiel asked him how he was going to pay for the asparagus, and he agreed to pay by bank guaranty.

(Testimony of Maxwell H. Rothstein.)

That upon receipt of the car numbers when the asparagus were shipped they would buy a bank guaranty to honor drafts on presentation. Their bank would wire the bank in California, guaranteeing payment for the carload of merchandise, and in a deal such as the one in question they generally place a deposit for the fulfillment of the con- [67] tract. He told all of this to Dinkelspiel and Edwards. Dinkelspiel and Edwards both stated that that would be satisfactory. It was around the luncheon hour and they stated that it was necesary that they take the matter up with the Court. The telegram (Defendants Exhibit No. 1) was dictated by Dinkelspiel in the presence of Edwards and Krasnow prior to the luncheon hour. It was dictated after the conversation with reference to putting up a surety bond. When he left for luncheon he said he would return later to draw up the contract with the stipulations agreed upon in the morning conference. At the conference in the afternoon, Edwards stated that he did not care to enter into the agreement discussed in the morning; that he was receiver for the court and did not want to get tangled up in a deal that may cause him some embarrassment; that he was not familiar with bank guaranties and preferred handling the collection in a different manner. Edwards wanted $10,000 placed in cash as a deposit in a bank in San Francisco. Also sufficient funds to take care of all the shipments that would come off that island. He asked Edwards

(Testimony of Maxwell H. Rothstein.)

how many crates of asparagus he expected to ship. Edwards said that it might be fifteen to twenty thousand crates, or more, and he told Edwards at that rate it would mean he would have to have $40,000 placed in a bank immediately to take care of the request, and that this was unreasonable; that they did not know just what the amount of the crop would be. Edwards said "that is the only basis I would be interested." He told Edwards if that is the way he felt he did not believe they were going to be able to do any business, and Edwards said that he did not know whether he would sell the asparagus; [68] that it might be best to later consign it through Roper. He told Edwards did he mean to say he wanted to gamble on the asparagus, and Edwards replied that with the pro-rate plan the asparagus may be worth more than in the past, and he told Edwards that if he felt that way about it, he wished him luck in his new venture. He shook hands with all and left, and then wired Philadelphia to cancel the previous instructions to place the bond. (Defendants Exhibit No. 1), as Edwards would not agree to the original terms. At the time he left the conference, Dinkelspiel stated he was sorry there was so much lost on the negotiation of the contract, and that they could not get together, and he told Dinkelspiel and Edwards that he was sorry they could not get together. Whereupon, a letter dated May 11th, 1934, was shown to the witness, and it was stipulated to that said letter was

(Testimony of Maxwell H. Rothstein.)

sent and received by the witness, which letter reads as follows:

DEFENDANTS' EXHIBIT C.

"Law Offices of
Dinkelspiel & Dinkelspiel
14th Floor
Pacific National Bank Building
333 Montgomery St.
San Francisco, Calif.

May 11, 1934.

M. H. Rothstein & Son,
Curtis Exchange Bldg., 3rd & Walnut,
Philadelphia, Pa.

In re: George N. Edwards, Receiver in Equity,
Golden State Asparagus Company
vs. Yourselves.

Gentlemen:

You will recall in the early part of February of this year your firm entered into a contract with George N. Edwards as Receiver in Equity of Golden State Asparagus Company wherein and whereby you agreed to take all of the green asparagus raised by him up to and including April 5th, 1934, at $2.00 per crate, f.o.b. cars out and that you agreed to furnish a satisfactory guarantee. You will also recall that you failed and" [69] "refused to furnish this guarantee and that you therefore by reason of said

(Testimony of Maxwell H. Rothstein.)

breach did not purchase any of the asparagus from our client, necessitating his selling it on the open market. Mr. Edwards has computed that by reason of the failure on your part to carry out the terms of the agreement entered into with him, the difference in the sale price between what he received for the asparagus and what he would have received under the contract amounts to $18,000.00, and demand is hereby made upon you for an adjustment in that sum without delay.

We might mention that unless satisfactory arrangements are made looking to the settlement of this claim a formal complaint will be made with the Division of Market Enforcement and the Department of Agriculture at Sacramento and suit will be commenced against you for the amount of the claim.

May we hear from you without further delay.

Very truly yours,

DINKELSPIEL & DINKELSPIEL,

By MARTIN J. DINKELSPIEL.

MJD:N"

Mr. TORREGANO: We offer the letter in evidence, if your Honor please.

Mr. DINKELSPIEL: We object to it, if the Court please as being a letter that calls for a settlement of a claim. It is an offer of compromise. I ask counsel to submit it to the Court.

(Testimony of Maxwell H. Rothstein.)

Mr. TORREGANO: We offer that letter solely for the purpose of setting forth the description of the property referred to therein and for the further purpose of showing the amount of the demand being made upon the defendants—for that limited purpose.

(Handing paper to Court)

The COURT: Read the statement of Mr. Torregano, Mr. Reporter.

(Statement read) [70]

Mr. TORREGANO: And also for the purpose of showing the nature of the guarantee.

The COURT: Read the statement of Mr. Dinkelspiel.

(Objection read)

(Discussion)

The COURT: I will sustain the objection.

Mr. TORREGANO: We offer now, if the Court please, the letter for identification, and note an exception to the ruling of the Court.

The COURT: It will be received as Defendants' Exhibit C for identification.

The WITNESS: There was a market for bunch asparagus in the City of New York between the dates of February 19th and April 10th, 1934. Also, in the City of Philadelphia. There is an established way among the produce dealers to ascertain the market value of asparagus. The terminal markets issue

(Testimony of Maxwell H. Rothstein.)
the Government bulletin daily, showing what the commodities sell for.

Whereupon, the witness was shown a copy of the official market reports on asparagus sold to jobbers in the City of Philadelphia for the period covering February 21st through April 29, 1934, inclusive, issued by the United States of America, Department of Agriculture, certified October 7, 1935, by Milo Perkins, assistant to the Secretary of Agriculture, pursuant to Title XXVIII, Section 661, United States Code, which copy was offered and received in evidence and marked "Defendants' Exhibit No. 3". The price quotations set forth in said Exhibit and the classifications of the asparagus therein are the same as the prices and classifications quoted in Plaintiff's Exhibit No. 9 hereinafter referred to for the City of Philadelphia.

Whereupon, the witness was shown a copy of the official market reports on asparagus for the City of New York for the period covering February 13th through April 30, 1934, inclusive [71] issued by the United States of America, Department of Agriculture, certified October 7, 1935, by Milo Perkins, assistant to the Secretary of Agriculture, pursuant to Title XXVIII, Section 661, United States Code, which copy was offered and received in evidence and marked "Defendants' Exhibit No. 4". The price quotations set forth in said Exhibit and the classifications of the asparagus therein are the same as the prices and classifications quoted in Plaintiff's

(Testimony of Maxwell H. Rothstein.)

Exhibit No. 9 hereinafter referred to for the City of New York.

Mr. TORREGANO: Amongst the asparagus trade or industry is there a general custom and usage which covers the making and execution of a contract and any contract to sell asparagus? [72]

Mr. DINKELSPIEL: I object to the question, if the Court please, as not being specific—as being general. We have had evidence there are jobbers and commission houses and there are four or five different grades of sellers and purchasers of asparagus.

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

The WITNESS: Yes.

Mr. TORREGANO: Is there also a custom and usage prevailing in the asparagus industry or trade governing negotiations preliminary to the making of a contract for the sale and the purchase of asparagus by a shipper from a grower?

The WITNESS: Yes.

Mr. DINKELSPIEL: I object to the question, if the Court please, on the ground it is incompetent, irrelevant and immaterial. The very point in the question, whether there is a custom or usage in connection with negotiations strikes me as being a little far-fetched. I mean, I can't quite fathom a question of usage with respect to negotiations. The very word "negotiations" negatives custom and usage. [73]

(Testimony of Maxwell H. Rothstein.)

Mr. TORREGANO: In the pleadings in this court, amongst the defenses asserted by the defendant, is that there was a negotiation prior to the making of a contract. I am now asking the witness to disclose to the jury and the Court as to whether or not, amongst the asparagus trade, there is a custom and usage—there is a custom which governs the negotiations preliminary to the making of a contract.

Mr. DINKELSPIEL: Then, I will add to my objection, if the Court please, that the answer of the defendant, I believe, alleges there were negotiations looking toward a contract. That is one of their defenses. They maintain they were purely negotiations; but if they rely, as a matter of defense, on custom and usage, it must be affirmatively pleaded; and I object on the ground it is not within the issues of this case.

(Discussion)

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

Mr. TORREGANO: Will you answer?

WITNESS: Yes.

Mr. TORREGANO: I will ask you: According to the trade custom and usage of the asparagus industry, what is customarily to be placed in any writings of negotiations between a seller—that is, a grower and a purchaser or shipper in regard to the sale and purchase of asparagus?

(Testimony of Maxwell H. Rothstein.)

Mr. DINKELSPIEL: I object on the ground a specific contract superseded trade custom and usage; and the only time trade custom and usage can be called upon to vary the terms of a written contract would be where the contract is silent in any [74] particular regard or respect; whether the contract is ambiguous.

(Discussion)

Mr. TORREGANO: I want to first show, if your Honor please,—there is a distinct custom amongst the trade and usage,—in the asparagus trade,—in connection with preliminary negotiations for a contract, whereby the parties in the preliminary negotiations assert they will do certain things; but thereafter and according to the custom and usage of the trade, they reduce to writing these specific things which they are required to do, so as to remove any ambiguity as to the preliminary negotiations.

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

The WITNESS: It is customary to have a clear understanding what the seller is selling and what the buyer is buying. The buyer wants to know what ranch he will be getting the asparagus from, if there are any crop liens, the age of the asparagus, when the cutting is to be done, the length of the asparagus, how it is to be graded, how it is to be packed, where it is to be delivered, and when delivered to

(Testimony of Maxwell H. Rothstein.)

cars whether the shipments are to be made by express, local or freight cars, or any particular railroad, if the asparagus should be pre-cooled, and if the asparagus is to be bunched; there are different grades of bunch asparagus, and there are different weights; these specifications are generally written up in a contract, on preliminary negotiations those things are discussed and thereafter reduced to writing according to the custom and usage of the trade.

Mr. TORREGANO: Mr. Rothstein, calling your attention to Plaintiff's Exhibit 3, I want you to read it again, yourself; and tell me when you sent that telegram to Mr. Edwards, [75] the receiver of the Golden State Asparagus Company,—the plaintiff in this case. Did you consider yourself bound to take all of the asparagus which Mr. Edwards offered to ship to you, in this telegram,—plaintiff's Exhibit No. 2; and also that you considered yourself bound to put up any guarantee of payment until you had received from Mr. Edwards a contract in writing?

Mr. DINKELSPIEL: I object to the question on the ground, first of all, it calls for the opinion and conclusion of the witness, on a matter the jury should properly pass upon, on a conclusion of law; and further, it is hypothetical, in that it does not call for any facts; and on the further ground that the documents speak for themselves; and the witnesses's opinion as to their effect is beyond his province as a witness.

Mr. TORREGANO: I would like——

(Testimony of Maxwell H. Rothstein.)

The COURT: (Interrupting) I would rather not hear the argument. I believe that he can say what he—as intended by the written contract. It is true that it doesn't bind that interpretation on the Court and jury, unless they wish to interpret, under all the circumstances of the case, such interpretation; but I think he has certainly a right to say whether he meant a certain thing in a contract. That's as far as it goes here; it doesn't change the text of the writing. I will allow it.

Mr. DINKELSPIEL: Exception.

The WITNESS: No.

The WITNESS: In the custom and usage of the asparagus trade, there is a difference between the terms "bunch asparagus" and "all shipping asparagus." "All shipping asparagus" can mean that you can [76] ship all asparagus, and "bunch asparagus" means graded asparagus as to the length, the amount of green, the weight, and how it is to be packed, there is no distinction between "all shipping asparagus" and all "green shipping asparagus."

Whereupon, the witness was shown a contract entered into in 1931, between Edwards, as Receiver, and H. P. Garin and Company and H. Rothstein and Son, which contract was stipulated to be an exact copy of the original contract, and was thereupon offered and received in evidence and marked

"DEFENDANTS' EXHIBIT No. 5",

reading as follows:

"THIS AGREEMENT made and entered into this ..... day of February, 1931, by and

(Testimony of Maxwell H. Rothstein.)

between GEORGE N. EDWARDS, as Receiver of Golden State Asparagus Company, a California corporation, hereinafter referred to as the 'receiver', and H. P. GARIN COMPANY, a California corporation, and H. ROTHSTEIN and ..... ROTHSTEIN, copartners doing business under the firm name of H. ROTHSTEIN & SON, of Philadelphia, Pa., hereinafter referred to as the 'buyer';

WITNESSETH:

WHEREAS, said GEORGE N. EDWARDS is the duly appointed, qualified and acting receiver of Golden State Asparagus Company, a corporation organized and existing under the laws of the State of California, in an action now pending in the District Court of the United States in and for the Northern District of California, Southern Division, entitled American Can Company, a corporation, plaintiff, versus Golden State Asparagus Company, a corporation, defendant, No. 2683-E, In Equity; and

WHEREAS, the receiver is now farming a 300 acre tract of land on Andrus Island in the County of Sacramento, State of California and another tract of land about 822.4 acres in area on Brannon Island, in the same county, both of which tracts of land are now planted and grown to asparagus; and

WHEREAS, the receiver is in need of at least the sum of $15,000.00 to pay some of the

(Testimony of Maxwell H. Rothstein.)

current obligations incurred during his said receivership, and in particular, to discharge $12,500.00 in receiver's certificates heretofore issued by him; and

WHEREAS, the buyers have agreed to advance and lend the sum of $15,000.00 and to accept receiver's promissory note therefor if said promissory note can be secured by a crop mortgage on the aforesaid crops of asparagus grown by the receiver, on said tracts of land situate on Andrus and Brannon Islands, in the [77]County of Sacramento, during the asparagus season of 1931 and 1932; and

WHEREAS, the receiver has agreed to sell, and buyers have agreed to buy, all of the merchantable green shipping asparagus grown by the receiver on said tracts of land on said Andrus and Brannon Islands, during the asparagus seasons of 1931 and 1932, subject to the approval by the said United States District Court of receiver's acts in making the arrangements detailed herein, and a formal order by said Court authorizing said receiver to execute this agreement and the promissory note and crop mortgage above referred to;

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein contained, the parties hereto agree as follows:

1. The sum of $15,000.00 shall be advanced and paid to the receiver on the execution of him of this agreement, together with the execution

(Testimony of Maxwell H. Rothstein.)

by him of a promissory note in favor of the buyers in the sum of $15,000.00, and the like execution of the crop mortgage herein above referred to, and shall be contingent upon the approval by the Judge of the United States District Court in which said receivership is pending of all of said agreements and his authorization to the receiver to execute the same.

2. The receiver agrees to grow, mature, cut and deliver on said tracts of land hereinabove referred to first class crops of merchantable green shipping asparagus during the years of 1931 and 1932, and the buyers agree to buy and receiver up to the 1st day of April of each of said years, all the merchantable green shipping asparagus so grown by the receiver and to pay therefor the following prices:

a. Five cents (5¢) per pound F.O.B. points of loading for all such asparagus grown by the receiver on the said 822.4 acre tract of land situate on Brannon Island;

b. Four cents (4¢) per pound F.O.B. points of loading for all such asparagus grown by the receiver on said 300 acre tract of land situate on Andrus Island.

The points of loading herein referred to shall be points on roads, rivers or sloughs (as the case may be) convenient and adjacent to said tracts of land, and shall be selected and designated by the buyers at the commencement of each asparagus season during said years.

(Testimony of Maxwell H. Rothstein.)

3. The time and manner of said payment shall be as follows: during the asparagus season of 1931 the buyers shall be entitled to repay themselves $7500.00 [78] of the total advance of $15,000.00 made to the receiver (and hereinabove referred to) by crediting the receiver with the sale price of the first asparagus delivered to them by the receiver, but the receiver shall be entitled to demand and to receive from the buyers partial payment on the sale price of said asparagus at the rate of two cents (2¢) per pound for each pound of asparagus delivered to the buyers until such time as the buyers shall have received a sufficient quantity of asparagus to have repaid themselves said sum of $7500.00, when the receiver shall be entitled to the full sale price. Said partial payments, and payments of the full sale price, hereunder, shall be due and paid by the buyers at the end of each two weeks period during the harvest and delivery of said asparagus. Provided, further, that if said sum of $7500.00 has not been repaid the buyers by April, 1931, they shall be entitled, at their option to deliveries after said date until said sum has been paid.

4. All asparagus delivered to the buyers hereunder shall be carefully cut according to buyers directions so that it will not be bruised or tip broken, and shall be delivered at loading points designated by buyers as hereinabove provided on the river bank, or roadside as the case

(Testimony of Maxwell H. Rothstein.)

may be, on the day it is cut in time for the buyer's boat or truck to pick it up in the late afternoon.

5. All asparagus delivered hereunder shall have as near five inches of green tip as possible and shall be cut at least ten inches long in order to maintain a nine inch bunch for shipping. Asparagus more than ten inches in length will be received by buyers and the butts thereof shall be cut off in order to make a nine inch bunch and the weights of all butts cut to make a nine inch bunch shall not be chargeable to or paid for by the buyers. Provided, however, that during the first ten days of the asparagus season the buyers may waive the requirement as to length and color and accept delivery of asparagus not complying with the specifications herein provide.

All asparagus delivered hereunder shall calibrate at least three eighths (3/8) of an inch in diameter, at the tip and green end and shall be larger at the butt end. Neither shall it be seeded or flowered nor broken, hollow, crooked, rusty or bug eaten but must in all respects be fit for the eastern markets under the customary standards of the season.

All asparagus must be delivered dry and unwashed, unless during the rainy season said asparagus shall be generally muddy, and the buyers shall require the receiver to wash it.

All asparagus delivered hereunder shall be

(Testimony of Maxwell H. Rothstein.)

weighed at the buyer's packing house in S. P. Warehouse at Isleton, California by receiver's represen- [79] tative and it is mutually understood and agreed that title to the asparagus delivered hereunder shall pass to the buyers when said asparagus is weighed at said packing house.

7. The receiver may cancel this agreement insofar as it affects the sale of asparagus for the asparagus season of the year 1932 at any time before July 1st, 1931, by paying the buyers the balance of said sum $15,000.00 due them and by notifying them in writing of his election to cancel the agreement.

8. The receiver may also elect to discontinue growing any or all of said asparagus on the said 300 acre tract of land situate on Andrus Island after the asparagus season of the year 1931, and it is mutually agreed that if this election is made by July 1, 1931, and notice thereof given to the buyers, all obligations of the receiver to grow, mature, cut and deliver a crop of asparagus on said island shall thereupon cease.

9. It is mutually understood and agreed that the term 'merchantable green asparagus' used herein shall mean all asparagus meeting the requirements of paragraphs 4 and 5 hereof.

10. This agreement does not contemplate anything but green shipping asparagus, maturing not later than April 1st of either year

(Testimony of Maxwell H. Rothstein.)

and the buyers are not required to accept any asparagus after April 1st of either year unless by mutual agreement with the receiver the buyers agree to accept further deliveries on terms to be also agreed upon.

11. It is further understood that the balance of said sum of $15,000.00 remaining unpaid after the 1st day of July, 1931, if any there be, shall be repaid out of credits from the first asparagus delivered to the buyers during the season of 1932, but the receiver shall also be entitled to demand an advance of two cents (2¢) per pound at the end of each two weeks when deliveries are being made, as in paragraph 3 hereof provided.

12. Nothing herein provided shall be construed as personally binding upon the said receiver, GEORGE N. EDWARDS, and it is to be distinctly understood that this agreement is made and entered in his official capacity as said receiver with the consent of said United States District Court. In the event that the said sum of $15,000.00 advanced hereunder by the buyers is not fully paid as herein provided, it shall be a direct obligation upon the assets in said receiver's possession, and shall be repaid as soon as possible.

This agreement shall be binding upon the successors or assigns of said receiver and upon the [80] heirs, personal representatives or assigns of the said buyers.

(Testimony of Maxwell H. Rothstein.)

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed the day and year first above written.

.....

H. P. GARIN COMPANY

.....

By .....

President

H. ROTHSTEIN & SON

.....

....."

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: He does not recall signing or reading the foregoing contract. He read it approximately the time they entered into the deal. It is the usual type of contract. He does not know whether it contained all of the elements that should be present in all contracts of this kind according to the custom and usage of the trade. He might have entered into an agreement that did not contain all the customary features he testified to. He has no regular printed form of grower's contract for the asparagus industry. In most deals with the grower the contract has to stand on its own feet, he would not say this as to every deal. He has been coming out into this territory of the Pacific Coast probably 12 or 14 years, sometimes he personally conducts negotiations and other times he has different dealers or brokers or representatives negotiate for him. Mr. Garin was a repre-

(Testimony of Maxwell H. Rothstein.)

sentative of his in 1934. Krasnow was an employee of his to some extent, he paid Krasnow a percentage of the profits. Krasnow's duty was to find crops which the witness in turn would buy or negotiate for. He had been up on the Delta in and around the different islands in Sacramento and looked over the fields to see who had the best asparagus and [81] *and* who had asparagus for sale on many occasions, but he cannot recall being up there at that particular time, the latter part of January, 1934 or before—the forepart of February. He is familiar with the country up there to some extent. He did not altogether depend upon Mr. Krasnow to tell him what asparagus was available. Krasnow suggested going to see George Edwards at his office in Oakland in 1934, in the month of February. It was stipulated that Krasnow told Mr. Rothstein to see Edwards with regard to entering into a deal in 1934. He discussed with Krasnow the kind of asparagus he was looking for, the best quality that is being shipped, he wanted bunch asparagus and some loose asparagus. At the meeting in Oakland he told Edwards he was interested in "shipping asparagus" not "canning asparagus". He presumed Edwards had some idea they sold most of their asparagus in Eastern markets. He did not know exactly the quantity and kind of asparagus Edwards had for sale. Bunch asparagus should be nine inches and straight spears, and not less than five inches green; it is usually figured on six to seven inches green, and it can also be known

(Testimony of Maxwell H. Rothstein.)

as "short grass". They may never be over five or six inches in length. Such bunch pack is to be straight and not up to the standard best grade, and would sell at a much lower figure on the market. There are three kinds of bunch asparagus, the two pound bunch, two and a quarter pound bunch, two and a half pound bunch and two and three-quarter pound bunch. Some shippers will take a larger bunch of grades and some smaller. He can't recall just what kind of deals they had in 1934 without getting the record. He presumed he had written contracts with growers in 1934. They had some, but he can't recall the basis. He recalls he had written contracts. He can't recall whether they were prepared by any attorney. He can not recall any grower that he bought asparagus from for shipment East during the year of 1934. He can't name them without the record. He has some in mind but [82] he cannot give the details. They dealt with the Liberty Farm, that was a consignment deal. He did not make a purchase and it wasn't necessary to have a contract. He cannot recall whether he had a deal in the year 1934 with a grower named Brown. Offhand, he doesn't remember anything about from whom he bought any asparagus in the year 1934. He would not say he recalled all particulars of the conversation *be* he recalls a conversation in Mr. Dinkelspiel's office, February 19, 1934, he recalls the substance of all the conversations. The term "bunch asparagus" does not have a definite meaning in the asparagus trade. You cannot

(Testimony of Maxwell H. Rothstein.)

use the words "bunch asparagus" to cover the definition of all the different grades, and packs, etc. In other words, you can't sell a buyer bunch asparagus. The buyer would want to know something about it. The term "bunch asparagus" does mean something and it [83] does not. You can answer it both ways.

Mr. DINKELSPIEL: And when you buy a grower's entire crop of bunch asparagus, you don't specify so many crates of colossal and so many crates of this and so many of that? You pay him a blanket price for his entire crop of bunch asparagus, don't you?

The WITNESS: Not exactly. You have to understand what kind of bunch asparagus you are buying.

Mr. DINKELSPIEL: Do you or don't you?

The WITNESS: No.

Mr. DINKELSPIEL: Have you any contract you can refer to where you have specified the number of crates of different grades of mammoth or colossal or these different grades of asparagus from any grower where you bought his entire crop?

The WITNESS: Contracts are not made up that way.

Mr. DINKELSPIEL: You haven't such a contract?

The WITNESS: No one else has.

Mr. DINKELSPIEL: All they refer to is 'bunch pack"?

The WITNESS: No.

(Testimony of Maxwell H. Rothstein.)

Mr. DINKELSPIEL: Did you, by any chance, intend to make an offer to Mr. Edwards in your wire from Seattle, of February 13, 1934?

The WITNESS: I——

Mr. TORREGANO (Interrupting): Just a minute. We object on the ground that the writing is the best evidence and speaks for itself.

The COURT: Objection overruled.

Mr. TORREGANO: Note an exception.

The WITNESS: Your Honor, I don't think——

The COURT: (Interrupting) A man can always say what his intention was.

The WITNESS: I didn't get it.

The COURT: Read the question.

(Question read)

[84]

The WITNESS: I don't know just what you mean by that offer.

The COURT: I presume you know every contract is an offer and acceptance. Now, were you offering a contract in that telegram to Mr. Edwards?

The WITNESS: Yes, he meant by his telegram (Plaintiff's Exhibit No. 3) that he was willing to confirm the $2.00 price and the stipulation of the contract was to be agreed upon, that is, as to the grade and pack and manner of payment. He meant by the words "bunch asparagus" in the telegram that he was going to get the very best grade of bunch asparagus, and have that understood when

(Testimony of Maxwell H. Rothstein.)

the contract was drawn up. The term "all bunch asparagus" as used by him did not include all qualities of bunch asparagus. He did not say anything about quality in his telegram, he expected to work it out at the meeting. He was going to have it understood in writing just what he was going to get. He knew where the asparagus was raised and produced, that was discussed on February 19, 1934, but there was nothing discussed on that particular date. They didn't get to that point where the asparagus was going to come from. He understood where the asparagus was being grown that they were contemplating entering into a contract for. He learned it from Mr. Krasnow over a telephone conversation, when he believes he was in Seattle, he can't recall whether it was before or after February 12th. It happened about the time he received a telegram from Edwards. He don't remember who called whom in this particular conversation. He believes Mr. Krasnow stated that he could buy Mr. Edwards' asparagus, or that he had bought it, subject to his approval. Just the exact wording of it he can't recall. It was just a conversation along those lines. Knasnow had mentioned the price $2.00 per crate. He believes he stated he could buy Mr. Edwards' asparagus for $2.00 per crate for bunch grass from Brannan Island, that is his best recollection. He did say that Mr. Edwards was going to confirm the asparagus to him [85] by wire, and naturally he received

(Testimony of Maxwell H. Rothstein.)

a wire from Mr. Edwards. This happened about the time he received Mr. Edwards' wire. The conversation took place before Mr. Edwards' telegram. He can't recall in this conversation with Krasnow whether he asked him anything at all about the quantity of the asparagus which would be delivered by Mr. Edwards, nor how much he would be obliged to pay for the asparagus, nor did he know the approximate quantity of the asparagus that would be delivered by Mr. Edwards under such an arrangement. He had no idea just what he was shipping. When you purchase a grower's crop of bunch asparagus, you do not know at the time you make the deal what sizes of bunch asparagus will be in the crop, that is, how much jumbo, fancy, select or extra-select, etc., and that is the reason stipulations are made in the contract. The firm of H. Rothstein and Sons does not sell in San Francisco or the local market. The asparagus he buys goes principally to the Eastern Seaboard. There are twelve bunches of asparagus to a crate. A bundle of bunch asparagus would have fifteen or sixteen spears of asparagus. A crate of bunch asparagus, to his knowledge, has no standard weight and will range from thirty-four to thirty-five pounds, depending on the packer. He had gone out in the field to look over a crop before buying it one or two times. He usually depends on representatives such as Krasnow. It may be Krasnow, or it may be another shipper in the business and then they determine some of the sources

(Testimony of Maxwell H. Rothstein.)

they have on asparagus received on the market. His firm has made some deals without seeing the product growing and they buy it with the specifications that it would have to meet certain conditions. They do not buy a cat in the bag. They usually know what they are doing before they close a deal. At Isleton they asked Edwards if he was ready to name a price for the asparagus. At the meeting with Edwards at Isleton, he does not recall whether he used the term "bunch asparagus", he presumes so, he can't [86] recall the exact wording. He was interested in buying asparagus either in bunches, or it might be loose. He does not know what kind of asparagus Edwards meant when Edwards said he would consider around $2.25 a crate. He was familiar to some extent with prices for "bunch pack asparagus" and "loose pack" in that industry. He told Edwards he was not interested at $2.25 per crate. He can't recall making any offer. He recalls testifying at the last session before leaving he again repeated when Edwards decided to name a price in line with the market, the prices talked about and offered on the Sacramento River, to get in touch with Mr. Krasnow as he was leaving for Seattle and did not know whether he would return or not. At the time Mr. Edwards quoted the price to him and which he said was too high, he did not know that his grass was flooded or where it was located and notwithstanding these factors, which determines the price of grass, he said it was too high. Grass

(Testimony of Maxwell H. Rothstein.)

early and in good condition might be worth $2.50 a crate. After leaving Isleton he kept in touch with Mr. Krasnow to some extent. He did not discuss with Edwards at Isleton reducing any deal that they might make to writing. He cannot recall anything being said about a guaranty in order to protect Edwards, in any contract that might be made. He does not recall whether or not Edwards verbally quoted him a price of $2.00 per crate f.o.b. cars Isleton for bunch asparagus from Brannan Island. He does not remember after he left Isleton whether he notified Krasnow either by wire or telephone to notify Edwards that he would accept a price of $2.00 a crate F.O.B. cars Isleton for bunch asparagus. He does not recall Edwards telling him at Isleton that he would hold the asparagus $2.00 F.O.B. cars for bunch grass at Isleton for a few days so that he would determine whether he wanted it or not and to notify Edwards either directly or through Krasnow.

At the meeting on the 19th day of February, 1934, at [87] Dinkelspiel's office, he does not recall whether or not Edwards told him that Edwards had stood by until receiving the wire (Plaintiff's Exhibit No. 3) and Krasnow's instructions that they were accepting the asparagus and that Edwards had turned down other offers until he had heard from Krasnow. He does not recall stating at the meeting to Edwards, Krasnow or Dinkelspiel "what are we here for", we have our deal. I don't know what

(Testimony of Maxwell H. Rothstein.)

you want this meeting for." He demanded the contract and wanted to know what the contents of the contract were before entering into a deal as to the negotiations for paying for this merchandise, etc.

Whereupon, the original contract entered into in 1931 between Edwards, as receiver, H. P. Garin Company and H. Rothstein & Son, was offered and received in evidence and marked Plaintiff's Exhibit No. 5, said Exhibit being the original of the copy heretofore set forth at page 38, and marked Defendants' Exhibit No. 5, said original being signed H. P. Garin Company, H. P. Garin, President, H. Rothstein & Son, by M. H. Rothstein and H. Rothstein.

The WITNESS: At the conference on Feb. 19, 1934, Edwards wanted to know how a bank guarantee was going to be handled as he was not familiar with bank guarantees and Edwards asked him some questions, asked him to explain it which he did. He told Edwards the bank guarantee method is handled with his bank, that his bank would wire the seller's bank guaranteeing the payment of a draft against a carload shipment. The amount guaranteed would be that day's shipment. The "bank guaranty", as he intended was that when shipments were made and Edwards wired his firm in Philadelphia giving the car numbers, his firm would wire a "bank guaranty" against the shipment, and that was the usual and customary method of handling bank guaranties for years and years. Up until the

(Testimony of Maxwell H. Rothstein.)

time that the car is shipped and up until the time that Edwards has wired his bank, his bank is under no obligation under that plan. If, in the meantime he instructed his bank not to honor [88] the draft, Edwards' wire could not make the bank pay. He would like to explain that they would not instruct their bank not to honor Edwards' draft or issue any order of that nature. The deal would be under contract, and they would place a bond or security until the contract was fulfilled. He told Edwards that if he requested his bank to put up $40,000 in a deal of that nature they might think he was crazy. He did state he was willing to place a deposit for the fulfillment of the deal and pay for each car as it was shipped. He recalls Dinkelspiel stating under an irrevocable letter of credit or under the other arrangement suggested of a bank guaranty by a local bank under instructions from his Philadelphia bank that there would be no liability on his part, nor would his bank have to put up any moneys except as and when shipments were made. [89]

They agreed upon a form of guarantee at the morning conference by which they agreed to pay for each shipment as they are made in carload units by bank guarantee having his bank instruct the bank at San Francisco to pay Edwards' draft against the car number and contents, and the original bill of lading, documents attached, showing the car is rolling to them. Edwards stated "suppose that you take delivery of earlier cars and later in a deal walk

(Testimony of Maxwell H. Rothstein.)

away from it." He told Edwards they did not do business along that line and Edwards said "I realize your reputation is all right, but I am only acting as receiver for the court and can't do anything I might be criticized for." He repeated to Edwards that the only way they could give him assurance is by placing a bond; and that he was willing to place a bond for $5000 for the fulfillment of the contract and pay Edwards for the shipment. That discussion took place principally in the morning. They discussed what the guarantee was to consist of before they knew the amount of the crates that were going to be shipped or the size of the deal.

Redirect Examination

By Mr. TORREGANO:

The WITNESS: Edwards said that a surety bond would be satisfactory.

Testimony of

BEN B. KRASNOW,

called as witness for the defendants.

Ben B. Krasnow, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The WITNESS: That he resides in Sacramento, California, and by occupation is a grower, packer, distributor and broker in fruits and vegetables, and has been for thirty-five years; that he has handled

(Testimony of Ben B. Krasnow.)

sales between growers and shippers of asparagus; that there is a custom and usage in the asparagus business regarding negotiations by grower and shipper for the sale of [90] asparagus and also as to entering into a final contract in regard to the sale of asparagus. He attended the conference in Dinkelspiel's office on February 19th, 1934. Dinkelspiel picked up a paper and said to Rothstein "You are paying $2.00 for this asparagus." Rothstein said "Yes, $2.00 for bunch pack asparagus". Dinkelspiel said "What kind of a payment do you want, George?" [91]

Edwards said "Well, we have got to have some security." Dinkelspiel said "What kind of security?" Edwards said: "We ought to have a bond." Edwards then stated that he had to have a $5,000 bond to stay until the contract was fulfilled. Dinkelspiel then asked Rothstein "Is there any way to arrange a bond?" Rothstein said: "We will wire our Philadelphia office to arrange that." The girl was called in and Dinkelspiel dictated the telegram (Defendants' Exhibit No. 1) and Dinkelspiel then asked them to come back in the afternoon at two o'clock. Rothstein said that Krasnow would represent him in this deal after the contract was signed and the proper negotiations for the bond were taken place. The specifications discussed at the meeting on February 19th with regard to the asparagus that was to be inserted in the contract was "bunch pack

(Testimony of Ben B. Krasnow.)

asparagus". In the afternoon, Edwards said the $5,000 bond was not sufficient, and they had to have more money. Rothstein did not state to Edwards or Dinkelspiel that he would not put up the $5000 surety bond.

According to the custom and usage of the asparagus trade, the term "bunch asparagus" has a definite meaning. It means the best asparagus, segregated from the field run of asparagus, with culls, hooks and crooks and broken tips discarded, and consists of so many spears to each bunch. There are five different grades of bunch asparagus.

Mr. DINKELSPIEL: May I see what the witness is reading from?

The WITNESS: Yes.

The COURT: Can't you testify without the aid of that paper?

The WITNESS: No, or no one else can about the number of spears in a——

The COURT: (Interrupting) In other words, whenever you have any dealings in asparagus—or had any dealings in asparagus or there is a discussion you have to refer to that to find the definition.

The WITNESS: No, I know the grades on the paper; but I am [92] trying to find out the number of stalks. Jumbo is 15 or 20, and colossal—, the first grade is colossal, the second grade jumbo, the third grade extra select, the fourth grade select, fifth grade extra-fancy. The term "all asparagus" does not mean the same as "all Bunch asparagus."

(Testimony of Ben B. Krasnow.)

Each grade of bunch asparagus has a different specification, different sizes of each stalk, color, length and so many stalks to the bunch.

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: The asparagus grown on Andrus Island is smaller than the asparagus from Brannan Island. A purchaser would not pay the same price for the bunch pack from Andrus Island as he would for asparagus from Brannan Island. He has been in the produce business, shipping, buying and raising produce for thirty-five years. He is forty years old. He started at the age of five years pushing a cart. He is familiar with the majority of the asparagus beds and the conditions on the Sacramento River. He is familiar with the Andrus Island and Brannan Island beds of asparagus and was familiar with these beds in 1934. [93]

At the conference held in Dinkelspiel's office, when the discussion of the money matters was not agreeable to Rothstein and Edwards or Dinkelspiel, Edwards stated that they couldn't make a deal and would call the thing off; that they all shook hands and said goodbye.

He was not working for Rothstein at that time and never worked for Rothstein. He has deals with him. He does not recall a conversation on Friday evening last with Edwards at Sacramento. He don't remember whether he had a talk over the telephone

(Testimony of Ben B. Krasnow.)

with Edwards Saturday morning last. He did not discuss this case with anyone before he took the witness stand. He did not discuss the case with anyone during the time he was sitting in the courtroom and at recess yesterday. He did not speak to anyone about this case since he left the witness stand this morning. He is not working for Rothstein at the present time. He never worked for him. Last week he sold Rothstein five cars of muscats. If the opportunity presents, he hopes to do business with him again. At the conference, Edwards stated he wanted $10,000 cash to be put up as a deposit and that he wanted money in the bank for 15,000 or 20,000 crates of bunch asparagus all told, $30,000 or $40,000 in a San Francisco bank deposited to Edwards' account. The first he heard anything said in connection with a guarantee—bank or otherwise—in connection with the deal in Dinkelspiel's office. Before the meeting on the 19th Rothstein went to Sacramento to see him. He sent the wire (Plaintiff's Exhibit 4) from Sacramento to Edwards in care of Dinkelspiel's office because Edwards told him he would be there when the appointment was made possibly three days before that. He had never seen the telegrams (Plaintiff's Exhibits Nos. 2 and 3). Before the meeting in Dinkelspiel's office he spoke to Rothstein and told him he had talked to Edwards and negotiated a $2.00 price and told Edwards to wire Rothstein at Seattle. During the conversations [94] he did not discuss the wires. (Plain-

(Testimony of Ben B. Krasnow.)

tiff's Exhibits Nos. 2, 3.) He recalls Dinkelspiel reading from a document during the conference, and that Rothstein stopped him when he said "all asparagus", and Rothstein said "bunch asparagus". Dinkelspiel never read a contract in his office. Dinkelspiel read from a blank piece of paper in his hands and was reading from a paper. Dinkelspiel never had a contract made in the morning and never finished the contract. The first thing said regarding money matters was a bond discussion. There was no discussion with reference to the quantity of asparagus to be delivered in the morning. He doesn't know, they could not, because no one knows how much a bed of asparagus will produce until it matures. He came back in the afternoon after 2 o'clock, he would not say it was 3:30. Dinkelspiel said in the afternoon that if a $10,000 bond was not put up, they could not do business. In the morning, Dinkelspiel had agreed to accept $5,000.

Redirect Examination

By Mr. TORREGANO:

The WITNESS: Rothstein said at the conference to Dinkelspiel and Edwards that he would have his bank in addition to the surety bond which he was putting up, wire for the payment of [95] each draft as each car was rolling. Dinkelspiel and Edwards wanted Rothstein to put up approximately $40,000 for the purpose of putting over the deal.

GEORGE N. EDWARDS

Recalled

By Mr. DINKELSPIEL:

The witness was shown and identified the original third report and account filed by him as receiver on the 21st day of September, 1934, amongst the records of the American Can Company v. Golden State Asparagus Company, which report and account was sworn to by said receiver on the 6th day of September, 1934, which said report and account was offered and received in evidence and marked "Plaintiff's Exhibit No. 6". That said exhibit recites therein that said report and account covers the period of the operation by the receiver and his account from March 1, 1933, up to and including February 28, 1934. That no reference is made therein to any dealings with H. Rothstein & Son or any of its members or agents regarding the 1934 asparagus crop belonging to said receivership estate.

The WITNESS: At the date the report (Plaintiff's Exhibit No. 6) was filed, he did not know whether he had a claim against H. Rothstein & Son as he had not disposed of the asparagus that he had on hand and did not know whether the same would be sold at a profit or loss. There was thereupon introduced plaintiff's Exhibit D for identification.

Testimony of

MARTIN J. DINKELSPIEL,

Called As a Witness for the Plaintiff

Martin J. Dinkelspiel, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

By Mr. LENER: [96]

The WITNESS: That he is a member of the firm of Dinkelspiel and Dinkelspiel, Attorneys, and was the attorney for George N. Edwards, as Receiver, during the month of February, 1934, and throughout that entire year. At the conference in his office, on February 19, 1934, the first thing Rothstein said was: "What are we here for? We have got a deal. What are we going to discuss?" Edwards said: "To get this bank guaranty fixed up that you agreed to put up." Rothstein then stated, "what do you mean by your bank guarantee, what kind of a guarantee do you want?" Edwards said, "I want an irrevocable letter of credit or some sufficient bank guaranty that Mr. Dinkelspiel will approve." I said I would have to know the amount of asparagus involved, and I said George that is your business, you know what you are raising up there, I don't know that, how much asparagus is involved? He turned to Mr. Rothstein and said: "What do you think about the amount that is going to be shipped?" Mr. Rothstein said: "Well, what's your idea? Edwards said, "I estimate that we will have 20,000 'bunch pack', and that the culls and loose grass which you are not interested in, are you?" and he said "no"—"about 23,000 crates. Rothstein

(Testimony of Martin J. Dinkelspiel.)

then said, "I guess that's about right." Edwards said "on a 20,000 crate estimate, I ought to have an irrevocable letter of credit for $40,000 so that as shipments are made, I can draw against your bank and be assured of payment. I do not want to take any chances on the tail-end of the deal along in April when the cars start moving—grass moves in large quantities—for you to reject my grass and say you don't want it, because the market is broken, and leave me with the asparagus to get rid of as best I can." Mr. Rothstein said "Do you think I am crazy?" I won't put up any such proposition, my bankers would think I was crazy if I asked him for a $40,000 letter of credit." Then I interrupted him and said "It is not so bad", all you have to do is to arrange with *you* bank that shipments which cover a period of 6 or 7 weeks as [97] they are made, that your bank will agree to pay the drafts as they are presented with shipping documents, and the shipping documents mean that you have accepted so it doesn't mean you have to put up $40,000 in cash or borrow immediately $40,000 in cash—or—I said "—if that isn't satisfactory, arrange with your bank—local bank in either Sacramento or San Francisco—that the local bank will give Mr. Edwards a written guarantee that upon his presentation of a sight draft, accompanied by a Bill of Lading and shipping documents that they would honor that draft without any further question, or call upon Philadelphia, or call upon H. Rothstein & Son. Mr. Rothstein stated he

(Testimony of Martin J. Dinkelspiel.)
wouldn't put up any such proposition at all; that he wasn't interested in putting up any guarantee of that kind. I said "Let's pass that a minute then; and let's see if everything else is understood; "I then took a document which I had on my desk, or in my desk—in a desk drawer; I took this document (Plaintiff's Exhibit 5) which is a contract between George N. Edwards or H. P. Garin and H. Rothstein and Sons, dated February 17, 1931, and I read it over, before Mr. Edwards and Mr. Rothstein, various clauses from this document. Whether I read each and every one, I don't recall. And as I read those clauses which I thought fitted the contract—that is, the telegrams (Plaintiff's Exhibits 2 and 3) which I had on my desk, I checkmarked them in my office, and at the time checked certain ones with checkmark—with a "v" checkmark." He told Rothstein and Edwards that if some compromise on the guaranty could be worked out he could draft up other terms of the contract, and that the only thing that was between them now was the question of the guaranty. In view of the fact that Rothstein had refused to put up a letter of credit or the guaranty, he then suggested to Rothstein would it be possible for him to put up a smaller letter of credit and some sort of a surety bond; that Edwards was not handling his own properties, and was subject to the criticism of [98] creditors and also the Court, and he wants to be fully protected. Rothstein then said he would see if he could get a $5,000 surety bond, and asked if

(Testimony of Martin J. Dinkelspiel.)

he would take it, and he told Rothstein "See if you can get it, and secondly, if you can get it, find out what company is going to write the bond, there are too many of these surety companies that have folded up in the past six months or year, and we want to know the name of the surety company so that we can find something about their rating." Rothstein said that he would wire his office and asked Dinkelspiel to dictate the wire to send to his office, and he dictated this wire (Defendants' Exhibit No. 1). He never heard from any surety company with respect to the bond mentioned in the telegram. He did not see the wire go out. He told Rothstein that he would not permit Edwards to enter into any compromise transaction whereby a lesser guaranty than $40,000 was put up without obtaining the approval of the Court. Rothstein stated he would go to lunch and be back at 1:30 or 2 o'clock. He told Rothstein he would draft up a document and would have something ready for him when he came back, and that the surety would have to be acceptable to the attorneys for the American Can Company and the Golden State Asparagus Company. The conference was resumed at approximately 3:30 at which hour Krasnow and Rothstein came back.

Whereupon, the witness was shown a draft of a contract, which was identified by the witness as being one set of two documents prepared during the noon hour, the first set having had clerical mistakes and imperfections, and this being the final draft.

(Testimony of Martin J. Dinkelspiel.)

Whereupon said document was offered and received in evidence and marked as

PLAINTIFF'S EXHIBIT NO. 7,

reading as follows: [99]

THIS AGREEMENT made and entered into this 19th day of February, 1935, by and between GEORGE N. EDWARDS as Receiver of the GOLDEN STATE ASPARAGUS COMPANY, a California corporation, hereinafter referred to as the "Receiver" and M. H. ROTHSTEIN and H. ROTHSTEIN, co-partners doing business under the firm name and style of H. ROTHSTEIN & SON of Philadelphia, State of Pennsylvania, hereinafter referred to as the "Buyers",

WITNESSETH:

WHEREAS said GEORGE N. EDWARDS is the duly appointed, qualified and acting Receiver of Golden State Asparagus Company, a corporation organized and existing under and by virtue of the laws of the State of California in an action now pending in the District Court of the United States in and for the Northern District of California, Southern Division, entitled American Can Company, a corporation, plaintiff, versus Golden State Asparagus Company, a corporation, defendant, No. 2683-L. In Equity; and

WHEREAS the Receiver is now farming certain acreage consisting of 573 acres more or

(Testimony of Martin J. Dinkelspiel.)

less located on Brannan Island, in the County of Sacramento, State of California, which land is now planted and grown to asparagus; and

WHEREAS the Receiver has agreed to sell, and the buyers have agreed to buy all of the merchantable green shipping bunch packed asparagus grown by the Receiver on said land during the asparagus season of 1934; subject to the approval of this contract by the United States District Court of the Receiver's act in making the agreement herein contained, and a formal order by said court authorizing said Receiver to execute this agreement. [100]

NOW THEREFORE, in consideration of the premises and the mutual agreements herein contained, the parties hereto agree as follows:

1. The Receiver agrees to grow, mature, cut, pack and deliver from said tract of land hereinabove referred to, a first class crop of merchantable green shipping asparagus during the asparagus season of 1934, as hereinafter defined, and the buyers agree to buy and receive from the date hereof up to and including the 10th day of April, 1934, all the merchantable green shipping asparagus grown by the Receiver and bunch packed by the Receiver and to pay therefor $2.00 per crate f. o. b. cars at Isleton, Sacramento County, California.

Payment to be made by the buyers in the following manner: The buyers agree to have their representative or representatives in Cali-

(Testimony of Martin J. Dinkelspiel.)

fornia execute a daily receipt for asparagus delivered as aforesaid, to the Receiver, who shall then draw a draft with accompanying invoice covering said shipment upon the buyers, who agree to immediately establish an irrevocable letter of credit for $5,000.00 at the Bank of California N. A., San Francisco, California, with instructions to honor said drafts accompanied by invoice of the Receiver and receipt of buyers as may be presented from time to time. The buyers further agree at any time upon partial or total exhaustion of said letter of credit and upon notice to that effect from said Receiver and demand upon the part of said Receiver, to renew said letter of credit to the maximum amount of $5,000.00 and agree at all times during the term of this agreement to maintain said letter of credit in an amount satisfactory to said Receiver, but not exceeding the sum of [101] $5,000.00 at any one time.

It is further stipulated and agreed by and between the parties hereto that in the event of the failure of said buyers to so maintain said irrevocable letter of credit, or any renewal or replacement thereof, as herein provided for, or at any time hereinafter up to and including April 10, 1934, to fail or refuse to accept the asparagus tendered them hereunder or issue the receipt to the Receiver as herein provided for, then said Receiver may at his election terminate this Agreement without notice and

(Testimony of Martin J. Dinkelspiel.)

sell his asparagus at the best price obtainable on the open market for either green or canning asparagus, and should the price so obtained by the Receiver be less than $2.00 per crate f. o. b. cars Isleton, said Receiver shall be entitled to and be paid any such difference, plus costs and legal expenses necessitated thereby for its collection, if any, from said buyers or from said surety company hereinafter referred to.

2. The buyers further agree to forthwith deliver to said Receiver a surety bond in the sum of $5,000.00 for the faithful performance of this contract on their part, the acceptance of said bond on the part of the Receiver to be subject, however, to the Receiver's approval of the bond as well as the surety Company writing said bond. In the event of the breach of this contract on the part of the buyers, seller shall have the right to apply as much of the aforesaid $5,000.00 bond as may become necessary toward the liquidation of his damages suffered thereby.

3. The parties hereto agree that all asparagus shipped by the Receiver from and including the 15th day of February, 1934, up to and including the date of this agreement, that the price [102] obtained for such asparagus shall be credited against the price of $2.00 per crate f. o. b. cars Isleton, California, as herein provided for, and should said price received by the Receiver be less than the sum of $2.00 per crate,

(Testimony of Martin J. Dinkelspiel.)

as aforesaid, the said buyers agree to forthwith pay said difference, and should said price received for the asparagus so shipped be in excess of $2.00 per crate f. o. b. cars Isleton, California, the Receiver agrees to allow said buyers to credit said sum against future payments to be made by them and the Receiver hereunder.

4. The Receiver agrees to deliver asparagus under this contract to the buyers in accordance with the kind and quality as defined in the Agricultural Code of California, as the same applies to fresh green shipping asparagus and particularly Sections 781, 788 and 810.5 of said act.

The seller further agrees to deliver said asparagus f. o. b. cars Isleton, California, bunch packed in crates of not less than thirty pounds net in weight.

5. This agreement does not contemplate anything but green shipping asparagus maturing not later than April 9th, 1934, and the buyers are not required to accept any asparagus after April 10, 1934, unless by mutual agreement of the Receiver the buyers agree to accept further deliveries on terms to be also agreed upon.

6. Nothing herein contained shall be construed as personally binding on the said Receiver, George N. Edwards, and it is distinctly understood that this agreement is made and

(Testimony of Martin J. Dinkelspiel.)

entered into by him in his official capacity as such Receiver with the consent of the United States District Court. [103]

This agreement to become binding and effective upon order of the aforesaid court being made and entered in the premises, and the Receiver agrees to furnish a true and correct copy of said Order to the buyers to be attached to their copy of this agreement.

THIS AGREEMENT shall be binding upon the successors and assigns of said Receiver and upon the heirs and personal representatives or assigns of the said Buyers.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed the day and year first above written.

.....

GEORGE N. EDWARDS
as Receiver in equity of
GOLDEN STATE ASPARAGUS COMPANY,
a corporation
H. ROTHSTEIN & SON

By .....

[104]

The WITNESS: When Rothstein and Krasnow returned after luncheon, he told Rothstein they had discussed the question of a surety bond with Walter Fox, attorney for the American Can Company, also Mr. Nielson, former President of the Golden State

(Testimony of Martin J. Dinkelspiel.)

Asparagus Company, and that they would not approve any transaction made with M. H. Rothstein & Sons on a guaranty or surety bond of $5,000.00; that he had taken the liberty of inserting in the agreement an additional provision, providing for a $5,000 surety bond, and also a $5,000 letter of credit, which was to be maintained at not less than $5,000 at the direction of Edwards. Rothstein said he would not sign any deal like that, nor give any surety bond. He asked Rothstein would he put up a $10,000 surety bond and that they could probably make a deal. Rothstein said he would not put up any surety bond, and that they would have to trade with him on his credit, or it was no deal. Edwards said: "Then, I guess we can't trade with you", and they shook hands. He told Rothstein he was sorry he had taken so much of his time, as he regretted losing the time, and Rothstein walked out with Krasnow.

The contract, plaintiff's Exhibit No. 7, was prepared subsequent to the statement by Rothstein that he would not put up a bank guaranty in the amount required by Edwards and that he would not put up an irrevocable letter of credit. Whereupon, the following was read to the witness from the contract, Plaintiff's Exhibit No. 7:

> "Whereas, the receiver is now farming certain acreage consisting of 573 acres more or less, located on Brannan Island, in the County of Sacramento, State of California, which land is now planted and grown to asparagus."

(Testimony of Martin J. Dinkelspiel.)

He recalls the term Brannan Island was used in the discussion during the morning conference. Whereupon, the following was read to the witness from the contract, Plaintiff's Exhibit No. 7:

> "Whereas, the receiver has agreed to sell, and the buyers have agreed to buy all of the merchantable green shipping bunch [105] packed asparagus grown by the receiver on said land during the asparagus season of 1934, subject to the approval of this contract by the United States District Court of the receiver's act in making the agreement herein contained, and a formal order by said Court authorizing said Receiver to execute this agreement." [106]

and the witness was asked whether that paragraph was discussed at the time that the Garin contract was read.

The WITNESS: That was not discussed at the time that the Garin contract was read. There was nothing said about that matter by either Rothstein, Edwards, or himself, except this. He stated in reading the Garin contract where a similar provision was inserted that under the contract as expressed by the telegrams, they thought that it would not be necessary if the bank guaranty was put up. Subsequently, he told Rothstein that they would require for anything less than a 100% guaranty, the approval of the Court, for the protection of the receiver, insofar as any criticism that might subsequently be directed toward him if anything went

(Testimony of Martin J. Dinkelspiel.)

wrong with the deal. Whereupon, the following paragraph from Plaintiff's Exhibit No. 7 was read to the witness, and the witness asked whether it was mentioned in the morning:

> "Payment to be made by the buyers in the following manner: The buyers agree to have their representative or representatives in California execute a daily receipt for asparagus delivered as aforesaid, to the receiver, who shall then draw a draft with accompanying invoice covering said shipment upon the buyers, who agree to immediately establish an irrevocable letter of credit for $5000 at the Bank of California N. A., San Francisco, California, with instructions to honor said drafts accompanied by invoice of the receiver and receipt of buyers as may be presented from time to time. The buyers further agree at any time upon partial or total exhaustion of said letter of credit and upon notice to that effect from said receiver and demand upon the part of said receiver, to renew said letter of credit to the maximum amount of $5000 and agree at all times during the term of this agreement to maintain said letter of credit in an amount satisfactory to said receiver, but not exceeding the sum of $5000 at any one time." [107]

The WITNESS: The provisions of the paragraph were not discussed by the parties in the morning; that in the afternoon he told Rothstein

(Testimony of Martin J. Dinkelspiel.)

he had prepared a draft of an agreement that he thought might be a way out of the difficulty in view of the fact that Rothstein had refused to put up the bank guarantee or irrevocable letter of credit in the amount of $40,000, that inasmuch as Rothstein intimated that he would try and get a $5000 surety bond in order to effect a compromise of the dispute that had arisen, Edwards was anxious to make the deal; that he had considered with other parties interested in the Receivership whose approval they would have to get for any deal of less than 100% guarantee and they had required at least a guarantee of some form of $10,000 and that in view of the fact Rothstein was endeavoring through his Philadelphia office to get *at* $5000 surety bond, he had inserted in the agreement, in order to save time, subject to Rothstein's further approval, a provision for a $5000 irrevocable letter of credit in the terms as outlined in the agreement. Whereupon, the following paragraph of plaintiff's Exhibit No. 7 was read to the witness:

> "It is further stipulated by and between the parties hereto that in the event of the failure of said buyers to so maintain said irrevocable letter of credit, or any renewal or replacement as herein provided for, or at any time hereafter up to and including April 10, 1934, to fail or refuse to accept the asparagus tendered them hereunder or issue the receipt to the receiver as herein provided for, then, said receiver may at his election, terminate this agree-

(Testimony of Martin J. Dinkelspiel.)

ment without notice and sell his asparagus at the best price obtainable on the open market for either green or canning asparagus, and should the price so obtained by the receiver be less than $2.00 per crate f. o. b. cars Isleton, said receiver shall be entitled to and be paid any such difference plus costs and legal expense necessitated thereby for its collection, if any, from said buyers of from said surety company hereinafter referred to." [108]

The WITNESS: The precise provisions of that paragraph were not discussed in the morning. They were discussed in the same manner in the preceding paragraph in the afternoon. However, in the morning, the question of a $5000 surety bond was discussed was brought up by Mr. Rothstein.

Whereupon, the following paragraph from plaintiff's Exhibit No. 7 was read to the witness:

"The buyers further agree to forthwith deliver to said receiver a surety bond in the sum of $5000 for the faithful performance of this contract on their part, the acceptance of said bond on the part of the receiver to be subject, however, to the receiver's approval of the bond as well as the surety company writing said bond. In the event of the breach of this contract on the part of the buyers, sellers shall have the right to apply as much of the aforesaid $5000 bond as may become necessary toward the liquidation of the damages suffered thereby".

(Testimony of Martin J. Dinkelspiel.)

The WITNESS: That was discussed in the morning and also in the afternoon. In the morning, after Rothstein said he would not put up a $40,000 bank guaranty or an irrevocable letter of credit, he asked Rothstein if there was any other basis they could get together on, and he asked Rothstein what about putting up a surety bond. Rothstein said he would see if his firm would put up a $5,000 surety bond. He told Rothstein that any bond he would approve for Edwards would have to be a company that was solvent, and he would want to know the name of the company, and whether the company was doing business in California, so that if they had to sue on a run-out on the deal they would not have to go to Pennsylvania to collect. [109] He told Rothstein to see if he could get one and they would let him know whether they would take it or not. He then dictated the wire. (Defendant's Exhibit No. 1). In the afternoon, he called to Rothstein's attention the provisions of the contract (Plaintiff's Exhibit No. 7) particularly with respect to the irrevocable bank guaranty of $5,000 and the provision regarding the $5000 surety bond. Rothstein said he was not interested in anything like that. Rothstein said he had tendered them a $5000 surety bond in the morning. He asked Rothstein what company is it in and he answered that he did not know, as he had not heard yet. He then told Rothstein that he had not heard from anybody here who might have received a wire from Philadelphia other than Rothstein. He told Rothstein

(Testimony of Martin J. Dinkelspiel.)
that they could not go ahead with any compromise deal unless they had at least $10,000 security up. Rothstein said he would not put up an irrevocable letter of credit, and was not interested in a surety bond; that they could deal with him on his credit. He told Rothstein suppose he put up a $10,000 surety bond in a satisfactory company they could make a deal and conclude the matter, that Edwards would pay the premium on the additional $5000. Rothstein said he would not put up any bond or guarantee, that they could either deal with him in the usual way or no way. Rothstein said that he made contracts for millions of dollars every year by telephone and telegraph, that if they did not want to deal with him the way he usually dealt they did not have to, that as far as he was concerned the deal was off.

The letter addressed to C. J. Carey, Chief [110] of Division, Department of Agriculture, under date of April 26th, 1934, (Defendants' Exhibit No. 2), was written to give a hypothetical case as near as he could about a situation that existed as between Edwards and Rothstein to ascertain whether such a case would be within the jurisdiction of the Department of Agriculture, whether any action could be taken against the firm of H. Rothstein and Son in that connection and for that purpose he ran off the letter without referring to his files and without discussing it personally with Edwards to check up on terms or terminology or detail. It was just to convey the general idea of what had occurred.

(Testimony of Martin J. Dinkelspiel.)

Neither Edwards, nor himself, asked Rothstein to open an account in San Francisco for $40,000 or any lesser sum. Edwards and he asked for a $40,000 irrevocable letter of credit or bank guaranty. Edwards did not, at any time, state that he did not know what a bank guaranty was, or asked Rothstein to explain it to him.

Mr. LENER: On February 19, what did Mr. Edwards say, if anything, when Mr. Rothstein refused to put up a bank guarantee satisfactory to him: that is to say, a bank guarantee covering a 100 per cent security.

The WITNESS: Mr. Edwards said "You have agreed to do that. I am surprised that you are running out now. You wired me that you would do it, and I would like very much to make a deal. My asparagus is moving, and if we could make any other kind of a deal that is satisfactory, I would like to make it. I don't want to drop the thing entirely.

Mr. TORREGANO: I ask that the answer go out, as the answer tends to vary the terms of a written document in evidence.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

Mr. LENER: On that day, Mr. Dinkelspiel, was there any discussion or conversation had with reference to the telegrams [111] in this case as a contract? If so, please give the conversation.

Mr. TORREGANO: We object to that on the ground that it calls for the conclusion and opinion of the witness.

(Testimony of Martin J. Dinkelspiel.)

The COURT: I will allow the question.

Mr. TORREGANO: We note an exception.

The WITNESS: Well, as I have stated heretofore—I just stated—after the refusal of Mr. Rothstein to put up a guarantee called for by Mr. Edwards and Mr. Edwards referred to those telegrams as a deal. Mr. Rothstein said, "I know it, but I am not going to put up any bank guarantee. I am not interested in a $40,000 bank guarantee; I won't go through with the deal. As Mr. Rothstein was leaving the conference in the afternoon, he said to Edwards, "What are you going to do with your asparagus, Mr. Edwards?" Edwards said: "Well, I don't know. I have not made up my mind yet. I guess as long as you won't take it I will have to consign it." Rothstein said: "Will you consign it to us?" Edwards said: "No, if I consign to anybody I will consign it to Roper. I have dealt with him before, and I am satisfied he gets me the best prices. The letter addressed to Carey (Defendants' Exhibit No. 2) was not the only letter he wrote in regard to the transaction between Edwards and Rothstein. On June 19, 1934, he wrote to the defendants' attorney.

Cross-Examination

By Mr. TORREGANO:

The attention of the witness was called to the letter dated May 11, 1934, addressed to the defendants (Defendants' Exhibit C for identification), and was identified by the witness as having been sent by him.

(Testimony of Martin J. Dinkelspiel.)

Mr. TORREGANO: I now introduce in evidence Defendants' Exhibit "C" for Identification as Defendants' Exhibit next in order.

Mr. LENER: At this time, if your Honor please, I will object to the introduction of the letter on the ground it [112] was simply an attempt to effect a compromise,—a compromise that failed; and as incompetent, irrelevant and immaterial.

Mr. TORREGANO: The letter speaks for itself.

(Discussion)

The COURT: I will sustain the objection.

Mr. TORREGANO: Note an exception.

The WITNESS: When Edwards told him he wanted a written contract, he told Edwards that he did not want to duplicate the work, to wait until Rothstein arrived, so if there was anything Rothstein wanted different or anything in connection with the bank guaranty, whether an irrevocable letter of credit, or whether a direct guaranty by a local bank, he would not have to redraft the agreement; that it would only take a few moments to reduce it to a written contract; Edwards was going to give Rothstein his choice of an irrevocable letter of credit for $40,000 or an out-right guaranty for $40,000 through a local bank. Edwards never told him that Rothstein had agreed to put up a $40,000 bank guaranty or any other specified amount. Edwards did tell him that Rothstein had agreed to a bank guaranty satisfactory to Edwards.

The drafting of the document (Plaintiff's Exhibit 7) did not dispose of all the controversy or

(Testimony of Martin J. Dinkelspiel.)

all the discussion that occurred during the morning session of the conference. He prepared the document to endeavor to effect a compromise between Edwards and Rothstein, and he was prepared to have Edwards sign the document. The thing that was not definitely disposed of in the morning conference was the question of guaranty. At the time Edwards requested him to pre- [113] pare a contract, he did not know the amount that was to be inserted. He does not recall that Rothstein asked anything about having the contract written up. It was assumed by all parties at the conference that they were there to draw up a written contract. He don't know what they might be in the office for except to have a contract of sorts drawn up or a paper drawn up that would memorialize these telegrams (Plaintiff's Exhibits 2 and 3). He had been apprised by both sides in the conversation in his office that they wanted the terminology used in the telegrams put in some formal document. Edwards wanted a written contract because he wanted a complete record of his transactions for the purpose of any inquiry by any creditor or interested party in the receivership estate. When he had the Garin Contract in front of him Rothstein had already refused to put up a bank guaranty.

When Rothstein asked Edwards at the conference what he was there for, Edwards said that he wanted to get the details of the bank guaranty straightened out as called for in his telegram (Plaintiff's Exhibit No. 2) and Rothstein's answer (Plaintiff's

(Testimony of Martin J. Dinkelspiel.)

Exhibit No. 3). He told Edwards and Rothstein that before speaking about the guaranty he thought Edwards had better ascertain the extent of his crop and see the extent of the guaranty. Mr. Edwards said he estimated that he will ship about 20,000 crates of bunch grass. Mr. Rothstein said that it was a fair estimate. Mr. Edwards then stated that they would have some other grass, that isn't covered in the deal, and that Rothstein was not interested in, some culls, probably a couple of thousand or so crates, or words to that effect. Mr. Edwards said that on that basis he would want a $40,000 bank guaranty or an irrevocable letter of credit. Edwards said he would leave the question of guaranty up to him in large parts. The telegram (Plaintiff's Exhibit No. 3) is the only writing that he knows of that exists whereby he was to fix the amount of the bank guaranty between [114] Edwards and Rothstein. Edwards said it was up to him to determine what would be the satisfactory bank guaranty. When he told Rothstein the provisions of the contract (Plaintiff's Exhibit No. 7) as to the guaranty, $5000 letter of credit and the $5000 surety bond, Rothstein tossed the contract on his desk and said he was not interested in any deal. The paragraph referring to the guaranty was not discussed with Rothstein in the morning conference. The conference in the afternoon lasted probably 20 minutes or half an hour. [115]

GEORGE N. EDWARDS,

Recalled

By Mr. DINKELSPIEL:

The Witness was shown certain yellow pages, bound with string and asked whether he knew what they were.

The WITNESS: They are my permanent records of the sales made by my agents for asparagus shipped during the season 1934.

Mr. TORREGANO: I object to that, if your Honor please and move to strike it out on the ground that it is hearsay as to the defendant.

The COURT: Same will be denied.

Mr. TORREGANO: Exception.

The WITNESS: The records are in his handwriting and are his permanent records. The entries were made at the time the asparagus was shipped and at the time he received payment. They are made right along from day to day. They are regularly kept records, whereupon the said documents were offered in evidence as the permanent records of Edwards, as Receiver, covering asparagus shipments and sales in the year 1934. Upon objection of the defendants, permission to cross-examine the Witness was granted by the Court.

Cross-Examination

By Mr. TORREGANO:

The WITNESS: The papers are written in pencil. When the asparagus was shipped by Roper, his agent, Roper notified him each day that it was

(Testimony of George N. Edwards.)

shipped, and to whom, and he made a record of it as he received the notices from Roper. When the selling agent sold the goods and rendered him [116] an account of sales, showing the amount of money obtained for each individual shipment, he recorded it.

Whereupon, the witness was shown one of the sheets showing an account with John Nix & Company, New York, and the witness was asked where he obtained the data.

The WITNESS: Part of it from Roper, and part of it from Nix. He shipped to Nix & Company, New York, through H. Roper & Company. Roper sent him a statement showing how many crates went to Nix.

When the goods are sold by the agent in the East, the agent makes up an account of sales which contains the same car number that Roper gave him when the shipment was made and also shows the number of crates and the grade sold and the price. The agent deducts the freight, the commissions or any charges that he pays out on the other end and sends him a check for the balance, together with the account sales. None of the transactions of the agent in the East was done while he was present. He is not able to state whether or not the return made by the agent in the East had been checked up by him or anyone else acting for him in the East. When the cars roll to place in the East and are sold the remittance is sent to him. He does not know whether Roper takes any remuneration. He does not give Roper anything out of the sale.

(Testimony of George N. Edwards.)

All of the asparagus was shipped through Roper to the different agents whose names appear on the sheets. When the agents sold the goods they sent an account sales, showing what each grade was sold for, and they deducted all charges against those goods, sending him a check for the net results. The gross sales, less the charges, which consist of freight, [117] sometimes cartage, pre-cooling and commissions, and the net shows the balance. He has no written agreement with Roper. Roper consigns the asparagus to the different parties in the East, wherever he thinks the market will be the best at the time the car arrives there for sale. It is his understanding that part of the commission deducted by the agent in the East is sent to Roper. The same situation applies to all of the accounts, with one exception, the Atlantic Commission Company. The account represents the cash sales at Isleton to the Company.

He makes some of the original records of his transactions, pertaining to the administration of the estate, in pencil.

Mr. TORREGANO: Tell us those that you make in pen and ink, and tell us those that you make in pencil, in connection with the administration of this estate.

Mr. DINKELSPIEL: I submit that it is immaterial, if the Court please and incompetent.

The COURT: I will allow the question.

The WITNESS: Well, I make such records as I have given you here, in pencil. Those—whatever the amount of cash I actually receive on the—on the—

(Testimony of George N. Edwards.)

shows on the outside column; and that is entered in ink rather than in my permanent records.

Mr. TORREGANO: Where is that permanent record showing the amounts put in in pen and ink, received from the sale of the asparagus.

The WITNESS: In my office. [118]

Mr. TORREGANO: Will you please produce them?

The WITNESS: I can produce them if I have time to do it.

Mr. TORREGANO: We now object. We make the further objection, if your Honor please. It now affirmatively appears, from the witness's testimony, that these are not permanent records of the administration of the estate showing the moneys received in the sale of this asparagus.

Rebuttal

By Mr. DINKELSPIEL:

Mr. DINKELSPIEL: Other than these 16 sheets, have you any other permanent record of the amount of asparagus shipped in the 1934 season, to whom shipped, which also has the net returns?

Mr. TORREGANO: We object on the ground it is incompetent, irrelevant and immaterial. The question before the Court is whether or not these are the permanent records showing the money received from the sale of the asparagus—pen and ink.

The COURT: I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: Yes.

Mr. DINKELSPIEL: What record?

(Testimony of George N. Edwards.)

The WITNESS: Well, I have the account of sales that I receive from the different agents, which I also keep as permanent records. I file them all and keep them. I have them for every year I have been there. I file each year separate, and at the end of the year I take all the accounts of sales, and advices I receive from Mr. Roper as to shipments, and balance them all up. [119]

Mr. TORREGANO: We object to that as hearsay and not binding on the defendants.

The COURT: I think we have a right to know just how he conducts his books. That is the investigation.

Mr. TORREGANO: But not what Mr. Roper tells him.

The COURT: Proceed to tell about the method of bookkeeping.

Mr. TORREGANO: We note an exception.

The WITNESS: I keep the original records I receive. Those I receive from Mr. Roper——

The COURT: (interrupting) The communications you receive from Mr. Roper and these account sales you keep?

The WITNESS: Yes.

The COURT: After you receive them, is *then* any entry on these sheets?

The WITNESS: Yes.

The COURT: In other words, no other records are kept save the original communications?

The WITNESS: Yes.

The COURT: What do you call this book—your account book, or what?

(Testimony of George N. Edwards.)

The WITNESS: I just call it 1934 Asparagus Sales.

Mr. DINKELSPIEL: Then, is there any other book of record in which you make entries besides this, and besides filing away the letters which you receive from Mr. Roper or these various checks throughout the season?

The WITNESS: One for the cash.

Mr. DINKELSPIEL: One for the cash?

The WITNESS: Yes.

Mr. DINKELSPIEL: And after you make this entry in the cash-book?

The WITNESS: (interrupting) After I make the entry, I turn it over to the bookkeeper and he enters it. [120]

Mr. DINKELSPIEL: Put under "Cash"?

The WITNESS: Yes.

Mr. DINKELSPIEL: And that is the complete record of all transactions?

The WITNESS: Yes, sir.

Mr. DINKELSPIEL: In other words, the cash-book should disclose, if properly kept, and your records here, every transaction you have in connection with these shipments?

The WITNESS: Yes, sir.

Cross-Examination

By Mr. TORREGANO:

Mr. TORREGANO: You stated, as I understand, the moneys received from the sales of the asparagus are reflected in the records kept by you as receiver of the Golden State Asparagus [121] Company in

(Testimony of George N. Edwards.)

some book other than these papers here; is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: And that book is kept in pen and ink; is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: And over what period of time did you make your different records?

The WITNESS: Well, I would have to see the dates.

Mr. TORREGANO: I will refresh your memory from the dates.

The WITNESS: I would say it covered the period from February 16th to April 5th, to the best of my recollection.

Mr. TORREGANO: Were they prepared during that period of time or prepared recently, for the purpose of exhibiting to the Court and jury?

The WITNESS: Daily; each day.

Mr. TORREGANO: You are sure about that, notwithstanding the appearance of the paper, as you receive information about each car or what money was being transmitted to you, you went to these records and put down in your own handwriting the name, the number of the car, the date that it was shipped, the number of crates of asparagus and the loose crates, if any, the day when the net proceeds were received and the amount of the net proceeds?

The WITNESS: Yes.

Mr. TORREGANO: That is done each day?

(Testimony of George N. Edwards.)

The WITNESS: Yes. [122]

Mr. TORREGANO: Do you use the same pencil?

The WITNESS: I don't know.

Mr. TORREGANO: Look at the paper, Mr. Edwards, and tell us.

The WITNESS: I couldn't tell you that, but the fact is he made those entries daily. He had them in a folder, a loose leaf folder. His bookeeper did not make the entries because he wanted to keep track of these sales, and he checked them up each day. At the time he was getting these sales, he was also getting a government report daily showing the sales made in the different markets, and he wanted to keep track and see that he was getting a proper price for his goods.

Examination

By Mr. DINKELSPIEL:

Mr. DINKELSPIEL: Yes, I will now offer these 16 pages identified by the witness, as plaintiff's next in order.

Mr. TORREGANO: To which we object on the ground that they are hearsay and incompetent, irrelevant and immaterial to prove any of the issues in this case, and upon the further ground that they are not the best evidence, and it affirmatively appears from the witness's testimony, that these are not books of permanent record.

The COURT: Objection overruled. They will be received as Plaintiff's 8 in evidence.

Mr. TORREGANO: We note an exception.

(Testimony of George N. Edwards.)

Said

PLAINTIFF'S EXHIBIT No. 8

reads as follows: [123]

1934

Frgt—Ref—Ctg .87

Asp. Shipments to JNO NIX & CO. NEW YORK

Date Shipped	Car Numbers		Date Shipped	Bunched Crates	Loose Crates	Net Proceeds Date	Net Proceeds Amt.
	Express		2/16	9		2/23	26.84
	P.F.E. 712		2/21	24		2/23	40.98
	Penn 2637		2/22	16		2/28	37.76
	P.F.E. 5302		2/24	14		3/5	41.58
	Penn 2791		2/24	9		3/1	21.06
Express	P.F.E. 799		2/24	20		2/28	34.97
	" 17598		2/27	14		3/14	40.23
	" 31771		2/28	17		3/15	45.34
	" 26246		3/1	74		3/16	172.13
	" 35628		3/3	87		3/16	211.51
	" 29961		3/4	181		3/16	373.36
	" 72032		3/5	164		3/16	343.72
	" 10397		3/6	149		3/16	295.45
	" 3627		3/7	208		3/17	407.83
	" 30595		3/9	49		3/19	104.80
	" 20245		3/12	249		3/22	454.55
	" 274		3/14	265		3/28	409.70
	" 33171		3/15	278		3/29	334.35
	" 38316		3/16	243		4/10	309.65Stg
	" 29386		3/17	181		3/29	208.58
	" "	Gil	"	21		3/29	29.74
	" 33680		3/18	110		4/11	129.85
	" "	Gil	"	63		4/11	60.08
	" 31390		3/19	110		3/31	143.58
	" "	Gil	3/19	63		3/31	70.95
	" 37685		3/20	167	To Chicago		
	" "	Gil	"	50	"		
	" 29393		3/21	219		4/9	270.25
	" "	Gil	"	69		4/9	79.85
	" 36143		"	63		4/2	71.40

(Testimony of George N. Edwards.)

Shipped Date	Numbers Car		Shipped Date	Crates Bunched	Crates Loose	Date Net Proceeds	Amt.
	P.F.E.27390		3/22	166	Albany		To Albany
	" "	Gil	"	58	"		"
	" 11338		3/23	169	Boston		To Boston
	" "	Gil	3/23	55	Boston		"
	" 203		3/24	134		4/4	152.22
	" 17401		3/24	77		4/5	98.19
	" 203	Gil	3/24	67		4/4	75.44
	" 20547		3/25	150		4/6	176.23
	" "	Gil	"	48		4/6	56.58
	" 20654		3/26	165		4/14	197.80
	" "		"	66		4/14	74.12
	" 50051		3/27	136		4/12	167.82 Wilkinson
	" "	Gil	3/27	33		4/12	48.22 Wilkinson
	" 28406		3/30	127		4/12	167.34
	" "	Gil	3/20	57		4/12	81.97
	" 19051	Roper	3/9	195		3/22	327.43
	" 33272	"	3/30	72		4/15	99.45

[124]

Frgt—Ref—Ctg .70

1934

Asp. Shipments to MERKEL BROS. CHICAGO

	Car Number		Date	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
	M.P. 3430		2/22	14	10	3/1	43.16	29.31
	P.F.E.15866		2/24	39		3/6	90.27	
Express	P.F.E. 799	x	2/24	10	10	3/1	34.74	22.66
	P.F.E. 1965		2/26	73		3/6	195.09	
	" 5955		2/26	46		3/9	135.62	
	" 31846		3/1	51	47	3/13	240.44	141.23
	" 23768		3/4	83	40	3/15	230.96	157.49
	" 71296		3/5	50	25	3/15	125.68	86.40
	" 16262		3/6	131		3/17	233.31	

(Testimony of George N. Edwards.)

	Car Number		Date	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
	P.F.E.	32150	3/7	50	50	3/20	145.72	77.48
	"	32359	3/9	76	90	3/20	258.40	142.55
	"	35876	3/10	75		3/20	131.64	
	"	21610	3/11	125	73	3/21	317.73	228.23
	"	6031	3/12	150	100	3/21	368.55	253.64
	"	19324	3/13	60	68	3/22	165.57	92.90
	"	27614	3/14	100	63	3/26	173.21	112.71
	"	22134	3/15	96	75	3/27	173.03	107.21
	"	10979	3/16	100	50	3/27	153.05	114.87
	"	29413	3/16	210	200	3/30	406.57	269.57
	"	31855	3/17	45	50	3/30	80.41	45.17
	"	32866	3/19	75	23	To Milwaukee		
	"	18544	3/19	59		4/3	87.22	
	"	2102	3/20	100		4/3	130.83	
	"	51536	3/21	144	75	4/4	240.56	188.39
	"	—8—	3/23	100	160	4/7	252.60	138.33
	"	70124	3/23	53	120	4/7	168.45	77.55
	"	"	3/23	45		4/7	59.84	
	"	7696	3/24	147	75	4/7	266.03	211.33
	"	14775	3/25	135		4/9	186.37	
	"	"	3/25	52		4/9	79.60	
	"	71687	3/26	95	50	4/10	173.17	126.43
	"	37685 (NY)	3/21	167		4/6	254.22	
	"	" Gil	"	59		4/6	91.36	
	"	25200	3/27	70	50	4/6	150.71	107.60
	"	" Gil	3/27	41		4/11	56.27	
	"	14246	3/28	70		4/11	107.02	
	"	30044	3/29	42		4/14	64.01	
	"	11268 Roper	3/15	192	72	3/27	401.51	319.38
	"	71385 "	3/28	244		4/12	376.27	
Gil	"	" "	3/28	80		4/12	122.96	
	"	18965 "	3/21	263	156	4/4	476.97	373.33
Gil	"	" "	"	31		4/4	44.49	
	"	22181 "	3/30	42		4/17	72.69	
Gil	"	" "	"	45		"	77.87	
				3860 Bunched			6021.11	

(Testimony of George N. Edwards.)

1934

Asp. Shipped to LA MANTIO BROS. CHICAGO

Date Shipp.	Car Numbers	Date Shipped	Bunched Crates	Loose Crates	Net Proceeds Date	Amt.	Bunched
	Express	2/16		5	2/21	13.59	
	P.F.E. 712	2/21	10	10	3/1	26.36	19.00
			10 Bunched			19.00	
		JNO NIX & CO.					
	P.F.E.19051	3/9Roper195			2/22	327.43	
			4479 Bunched			6820.28	
		ATLANTIC COMMISSION CO.					
	Cash sales	3/29	275		3/29	412.50	
	"	3/31	304		4/3	419.75	
	"	4/1	406		4/3	565.75	
	"	4/2	432		4/3	602.15	
	"	4/3	415		4/6	577.00	
	"	4/4	342		4/6	478.00	
	"	4/5	474		4/6	653.15	
			2648			3708.30	

[126]

(Testimony of George N. Edwards.)

Frgt & Ref. .20

1934

Asp. Shipped to W. A. BEASLEY & CO. LOS ANGELES

Date Ship	Car Numbers	Date Shipped	Bunched Crates	Loose Crates	Net Proceeds Date	Net Proceeds Amt.	Avg. Per Crate
	Express	2/21		12	3/4	29.21	
	"	2/22		6	"	13.65	
	"	2/24		29	"	76.54	
	"	2/26		56	2/28	109.28	
	"	2/27		52	3/1	92.46	
	"	2/28		60	3/2	109.39	
	"	3/1		17	3/3	31.85	
	"	3/2		30	3/5	40.64	
	"	3/3		64	3/5	44.80	
	"	3/4		29	3/6	38.91	
	P.F.E.20088	"		111	3/7	137.93	
	" 21291	3/5		88	3/8	114.67	
	Express	3/5		20	3/7	23.79	
	P.F.E. 9956	3/6		97	3/9	130.34	
	" 23581	3/7		80	3/10	97.27	
	" 11356	3/9		152	3/12	161.52	
	" 32217	3/10		100	3/14	110.82	
	" 33244	3/12		185	3/14	213.54	
	" 8687	3/15		155	3/19	161.14	
	" 50092	3/17		240	3/28	216.41	
	" 30857	3/19		202	3/23	126.77	
	" 24654	3/22		90	3/27	55.86	
	" 29122	3/24		53	3/29	32.72	
	" 19512	3/25		60	3/31	33.64	
	" 30880	3/29		39	4/2	23.63	

[127]

(Testimony of George N. Edwards.)

1934

Asparagus to ALTMAN & SWARTZ BUFFALO

Car Number	Date	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
P.F.E. 26310	2/28	11		3/9	38.52	
" 30794	3/7	39		3/20	51.65	
" 18842	3/10	196		3/22	266.97	
" 9653	3/21	132	100	4/5	250.25	156.35
" "	"	41		4/5	47.74	
" 32577 Roper	3/13	268	120	3/27	561.42	433.47
		655.13÷519=1.25 per crate avg.				
		687 Bunched			989.70	

[128]

1934

Ship to THE MEYER WEIL CO. CLEVELAND

Car Number	Date	Bunched	Loose	Net Proceeds Date	Amt.
P.F.E. 26310	3/28	23)	42 crates	3/12	161.00
" "	"	30)	11 Buffalo		
" 37991	3/8	187	To Boston		
" 32178	3/13	190		3/26	350.24
		419 Bunched			511.24

[129]

1934

Asp. Shipped to L. SINGE & SONS & CO. KANSAS CITY

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
F.E. 913	3/2	75	66	3/24	247.38	135.75
		75 Bunched			135.75	

[130]

(Testimony of George N. Edwards.)

1934

Asp. Shipped to JOHN AIEOLLO BROS. CORP. ALBANY N. Y.

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	
P.F.E. 13679	3/2	72		3/19	126.49	
" 27390	3/22	166		4/6	231.47	From Nix
" "	3/22	Gil 58		4/16	80.81	
		296			438.77	
		438.77÷296=1.49 avg per crate				
		296 Bunched			438.77	**[131]**

1934

Asp. Shipped EDWARD READ & SON DETROIT

Car Number		Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
P.F.E.19263		3/3	128	39	3/16	323.02	268.70
" 12178		3/6	50	75	3/17	200.26	95.78
" 14829		3/8	103	50	3/19	254.00	188.49
" 27362		3/10		60	3/22	67.36	
" 29907		3/14		162	3/24	203.15	
" 52269		3/16	162		4/3	195.67	
" 15049		3/17	50	57	4/4	104.27	57.41
" "	Gil	"	25		4/4	29.91	
" 27904		3/21	100	86	4/9	173.84	117.84
" 10933		3/22	105		4/10	128.40	
" "	Gil	"	42		4/10	51.80	
" 19934		3/24		75	4/9	63.86	
" 18576	Gil	3/25	33		4/7	40.02	
" 27948		3/26	90	60	4/17	173.32	121.05
" "	Gil	"	34		4/7	46.71	
" 5682		3/27	71		4/18	100.50	
" "	Gil	"	26		4/18	37.24	
" 6861	Roper	3/19	220		4/6	245.23	
Gil " "	"	3/19	37		4/4	46.95	
" 51672	"	3/20		175	4/2	137.55	
Gil " "	"	3/20		12	4/2	12.00	
" 8039	"	3/25		198	4/16	199.86	
" 52559	"	3/27		159	4/18	155.78	
" 12606	"	3/29		14	4/19	19.55	
" 50058	"	3/30		63	4/20	66.48	
			1176 Bunched			1771.70	

(Testimony of George N. Edwards.)

1934

Asp. Shipped to H. B. FISKE & CO. PROVIDENCE

Car Number	Date Shipped	Bunched Pack	Loose Pack	Net Proceeds Date	Net Proceeds Amt.
P.F.E. 37285	3/6	49		3/22	97.71

[133]

1934

Shipped to FRUIT SUPPLY CO. ST. LOUIS

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.
P.F.E. 52763	3/11	152		3/31	186.21

[134]

1934

Shipped to E. R. GODFREY & SONS CO. MILWAUKEE

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.	
P.F.E. 50115	3/13	171	44	7/4	321.51	262.75
P.F.E. 32866 (Chicago)	3/19	75	23	4/10	128.03	105.92
						378.67
		246 Bunched			378.67	592.

[135]

1934

Shipped to CHAS. BASCH & CO. HARTFORD, CONN.

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.
P.F.E. 1729	3/15	173		3/28	354.57

[136]

(Testimony of George N. Edwards.)

1934

Shipped to LORD & SPENCER — BOSTON

Car Number	Date Shipped	Crates Bunched	Crates Loose	Net Proceeds Date	Net Proceeds Amt.
P.F.E.37991	3/8	187		3/19	336.60
" 19097	3/18	45		3/30	52.18
" "	3/18		Gil 49	3/3	45.80
" 11338	3/23	169		4/6	221.84
" "	"		Gil 55	4/6	69.10
" 51236 Roper	3/17	166		3/30	201.82
Gil " " "	"	54		3/30	65.42
" 4603 "	3/28	60		4/8	88.10
" " "	"	13		4/8	21.64
		798 Bunched			1102.50

C. H. ROBINSON

P.F.E. 4433Roper	3/18	93		4/2	112.34

[137]

1934

Shipped to H. D. ROPER — CHICAGO

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.	Sold by
6						
P.F.E. 19051	3/9	195		3/22	327.43	Nix
" 32577	3/13	268	120	3/27	561.42	Buffalo A&W
" 11268	3/15	192	72	3/27	401.51	Chicago
" 51236	3/17	166		3/30	201.82	Boston
" " Gil	3/17	54		3/30	65.42	"
" 4433	3/18	93		4/2	112.34	Denver
" 6831	3/19	220		4/6	245.23	Detroit
" "	3/19	37		4/4	46.95	"
" 51672	3/20		175	4/2	137.55	Detroit
" " Gil	"		12	4/2	12.00	
" 18965	3/21	263	156	4/4	476.97	Michel Chicago
" " Gil	"	31		4/4	44.49	"
' 8038	3/25		198	4/16	199.86	Detroit

(Testimony of George N. Edwards.)

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	Sold by
P.F.E. 52559	3/27		159	4/18	155.78	Detroit
" 4603	3/28	60		4/8	88.10	Boston
" " Gil	"	13		4/8	21.64	"
" 71385	3/28	244		4/12	376.27	Chicago
" " Gil	3/28	80		4/12	122.96	Chicago
" 12606	3/29		14	4/19	19.55	Detroit
" 22181	3/30	42		4/17	72.69	
" " Gil		45		4/17	77.87	Chicago
" 33272	3/30	38)	72	4/13	52.70) 99.45	New York
" " Gil	"	34)		4/13	46.75)	
" 50058	3/30		63	4/20	66.48	Detroit

[138]

The WITNESS: At the time he made the entries in Plaintiff's Exhibit No. 8 and in particular the entries having to do with the net receipts, he made inquiry to ascertain the market price in which the goods were sold on the date of sale.

Mr. DINKELSPIEL: Will you state what inquiry you made in that connection?

The WITNESS: During the period I am shipping asparagus I receive bulletins from the Department of Agriculture, showing the sales made in the different markets on the different days, and as I get these reports of sales I refer to this bulletin to see whether my agents are getting the average price as compared with the price recorded by the Department of Agriculture.

Mr. TORREGANO: We move to strike that out as hearsay and not binding on the defendants; and

(Testimony of George N. Edwards.)

we make the further objection to strike the entire answer on the ground it is not the best evidence; and we now ask your Honor to instruct the witness to produce in court tomorrow morning the Government reports testified to by him which he daily received, and on which he is now testifying:

The COURT: That is a little different issue; but I will deny the motion to strike it out.

Mr. TORREGANO: Note an exception.

The WITNESS: The group of papers shown him are the "Federal State Market News Service". He obtained them daily, in his business of operating the Golden Gate Asparagus Company from the United States Department of Agriculture, Bureau of Agricultural Economics, Ferry Building, San Francisco, California. The reports in his hands are duplicates obtained at the San Francisco office of the Department of Agriculture.

Mr. DINKELSPIEL: Will you please state under what circumstances you obtained those duplicates.

Mr. TORREGANO: I object as incompetent, irrelevant and immaterial. [139]

The COURT: I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: He went to the office and told them he wanted duplicates of the reports that had been sent out during the year from February 16, 1934, till April, 1934, of the sales of asparagus in the principal markets * * * eastern markets of the

(Testimony of George N. Edwards.)

United States and these are the papers they handed him. He looked at the papers before coming to court and they are similar reports to those which he received in the year 1934. He compared his returns of sale in the various markets insofar as he was able with the figures shown on the original reports that he received from the Department of Agriculture.

Mr. DINKELSPIEL: And did that comparison from day to day that you made with the United States Reports—or Department of Agriculture Reports show as to the prices that you were being paid for your asparagus in the various markets where it was being sold?

Mr. TORREGANO: Just a minute. I object to that as calling for the conclusion and opinion of the witness; and the report is the best evidence.

Mr. DINKELSPIEL: I am asking not for a conclusion. I am asking for a fact.

The COURT: You are asking him: did he compare the two?

Mr. DINKELPSIEL: I am asking what the reports showed in comparison to the prices received.

The COURT: That's a comparison.

Mr. DINKELSPIEL: Received by him.

The COURT: I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: The reports showed the prices was receiving were in line with the prices mentioned on these reports.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I object to that and move to strike it out on the ground it is expressing the opinion and conclusion of the [140] witness.

The COURT: Overruled.

Mr. TORREGANO: I note an exception. [141]

Mr. DINKELSPIEL: We will now offer this set of papers headed: "Federal-State Market News Service, United States Department of Agriculture, Bureau of Agricultural Economics, Room 1, Ferry Building, San Francisco, California, Department Market Information Service, Telephone Exbrook 6317-18"; and headed by sheet dated "Monday, February 26, 1934", in evidence as plaintiff's exhibit number 9, I believe it is.

Mr. TORREGANO: To which we object on the ground that they are incompetent, irrelevant and immaterial, and not the best evidence, as it affirmatively shows these documents presented to the court were not certified documents as required under the law.

The COURT: I will take the submission under advisement.

Mr. DINKELSPIEL: We will offer these for identification.

The COURT: They will be received that way. I presume they are offered in evidence, but I have not passed on that.

Mr. DINKELSPIEL: Yes.

The COURT: They will be marked Plaintiff's Exhibit "E" for Identification.

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Q. Mr. Edwards, I am going to show you Plaintiff's Exhibit No. 8, being the records of your asparagus sales, and I am going to ask you if you have totaled from those records the total amount of what you received during the 1934 season for bunch grass sold by you,—from this record?

Mr. TORREGANO: We object to that, if your Honor please, on the ground it is hearsay as to these defendants, and not binding on them, and it is incompetent, irrelevant and immaterial.

The COURT: I will overrule the objection.

Mr. TORREGANO: Exception.

The WITNESS: Yes.

Mr. DINKELSPIEL: What does that total amount of sales of [142] bunch grass, between the dates of February 16th and April 10th, 1934, made by you, amount to?

Mr. TORREGANO: We will object to that on the ground it assumes something not in evidence, and we object to the form of the question.

The COURT: Overruled.

Mr. TORREGANO: Exception.

The WITNESS: $22,547.85.

Mr. TORREGANO: Let me have that figure again.

The COURT: Read it.

The WITNESS: $22,547.85.

Mr. DINKELSPIEL: Mr. Edwards, can you state whether or not you have totaled the number of

(Testimony of George N. Edwards.)

cars of bunch pack asparagus, from those original records that you have in your hand there, sold by you between the dates of February 16th and April 10th, 1934?

Mr. TORREGANO: We object to the form of the question upon the ground it assumes something not in evidence, is incompetent, irrelevant and immaterial, and not binding on these defendants.

The COURT: Overruled.

Mr. TORREGANO: We note an exception.

The WITNESS: I have.

Mr. DINKELSPIEL: And what is the number of cars?

The WITNESS: 15,161. [143]

Whereupon leave to cross-examine the witness was given.

By Mr. TORREGANO:

The WITNESS: He has had business relations with commission merchants back East by which he paid them commissions over a period of 30 years. The commissions fluctuate, he means they fluctuate from one commodity to another, and a man might make a special deal with some commission merchants for a different price. The transaction with Roper was the customary one, the customary method is for a local grower to pack his asparagus on the ranch—all the grades to a shipper of the type of Roper, or what are termed "local consignee", who distributes it throughout the East to his different connections. He ascertained the custo-

(Testimony of George N. Edwards.)

mary commission being paid in 1934 by consulting a number of men in the same line of business as Roper. He don't recall all of them. One of them was the Riverside Sales Company. Another was an outfit at Antioch. These concerns wanted to secure the sale of the asparagus. He supposed there were a thousand came to him at different times in the season and asked him to ship the goods to them. They told him the commissions they would charge, and in other cases they didn't. He made inquiries from Eastern commission men to ascertain what the customary commission charge was to be paid eastern commission merchants. Nix in New York and Merkle Bros. in Chicago told him the customary commission charge was 10%. He paid 10% commission. He has no personal interest in the outcome of the case. It is nothing to him personally in the way of remuneration whether he wins the case or not. He is simply protecting the interests of the creditors as far as he knows. His compensation is fixed by the court on a monthly basis, and this means a little more work for him to have this case on. He had a telephone conversation with Krasnow on Saturday morning, October 26, 1935, and Krasnow said that he did not recall the meeting at Isleton with Rothstein, the length of time taken up at the meeting, [144] the price Edwards had offered to sell the asparagus to Krasnow or Rothstein. He asked Krasnow if he remembered the price that he offered to sell his asparagus to Krasnow for Rothstein, Krasnow said

(Testimony of George N. Edwards.)

"No, George, I don't remember anything about the deal."

Cross-Examination.

By Mr. TORREGANO:

Mr. TORREGANO: Mr. Edwards, you testified that the total bunch crate asparagus included or reflected in documents No. 8—Plaintiff's Exhibit 8—is 15,161—is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: Can you state to the Court and jury what are the different grades contained in the 15,161 crates of asparagus—bunch asparagus?

The WITNESS: I——

Mr. DINKELSPIEL (interrupting): May I ask the Court to have the last question?

The COURT: Read the question, Mr. Reporter.

[145]

(Question read.)

The WITNESS: Yes.

Mr. TORREGANO: How many crates, if any, were Colossal asparagus?

Mr. DINKELSPIEL: I object to that, if the Court please, as being incompetent, irrelevant and immaterial, and not as proper cross-examination.

The COURT: I will sustain the objection.

Mr. TORREGANO: Note an exception. How many crates, if any, were Jumbo asparagus?

Mr. DINKELSPIEL: I make the same objection.

The COURT: Same ruling.

(Testimony of George N. Edwards.)

Mr. TORREGANO: Exception. How many crates, if any, were Extra Select asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORREGAN: Exception. How many crates, if any, were Select asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORRENGA: Exception. How many craes, if any, were Extra Fancy asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORREGANO: Exception. How many crates, if any, were Fancy Asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORREGANO: Exception. [146]

The WITNESS: The net proceeds reflected in Exhibit 8 showed the money received by him. There was deducted before he received this money all shipping charges, freight commission, pre-cooling and cartage charges. All charges were deducted from his account sales. Whatever charges originated here followed the shipment east and Roper arranged with agents in the east to make the total deductions there and the agent in the east sent a check to Roper for what charges Roper had against the shipment and the agent kept his own and he got a check for the net proceeds, after all these deductions were charged. The account sales is made up by the one who sells

(Testimony of George N. Edwards.)

the asparagus in the East, and when he sells that asparagus against that particular shipment, the seller has a memorandum of the charges that have accrued against that particular shipment. Part of those have been paid out by Roper, and part of them is commission Roper is to get out of the sale, and part of them is the seller's charges and commission, and the seller makes a deduction on the account sales for the entire amount and sends the check for the net proceeds. The total commission charge was 10% and that was divided between Roper and the eastern agent. He don't know whether he has ever seen any checks or money passed from one to the other. His general understanding was that the man in the east got 5% commission and the forwarder here, 5% commission. All of his dealings had been through a representative on the coast and he had never dealt direct with any eastern representative. He did not try to deal directly with any eastern concern in 1934 with reference to the asparagus in question. The figures shown on Plaintiff's Exhibit No. 8 represented a complete accounting of the money to be received from the sale of the asparagus. He was familiar with the fact that claims were filed against the railroad with reference to asparagus shipped. Claims are filed by the forwarder. He received from Roper an accounting of the money received from the [147] railroad company on the claims filed. He did not know whether he had with him the statement showing moneys collected by Roper from the railroad claims filed.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I am calling your attention to the Defendants' Exhibit 8, and ask you again does Defendants' Exhibit 8 show the entire money received from the sale, disposition or consignment of the asparagus which you had negotiated with Rothstein for sale [148] to them? I said Defendants', your Honor—Plaintiff's Exhibit 8.

The WITNESS: No.

Mr. TORREGANO: It does not?

The WITNESS: No.

Mr. TORREGANO: We move to strike out from the record, if your Honor please, Plaintiff's Exhibit No. 8, on the ground it is incomplete.

The COURT: Motion denied.

Mr. TORREGANO: We note an exception.

The WITNESS: In addition to the money specified, he realized upon the crop shipped east, there may be forty or fifty dollars, he don't know, he can't state positively, there may be a few dollars more, he don't think it amounts to more than forty or fifty. Roper would send him a check for moneys collected from the railroad claims.

Mr. TORREGANO: Please tell this Court and jury as to whether or not, prior to October 1934, had you received from Mr. Roper a check or checks covering recovery made by and pursuant to claims filed with the railroad company by reason of the shipments of the asparagus delivered to him at Isleton?

(Testimony of George N. Edwards.)

The WITNESS: I couldn't tell without consulting my records.

Mr. TORREGANO: Did you refer to your records before this case commenced, for the purpose of ascertaining that?

The WITNESS: I don't recall.

Mr. TORREGANO: Let me get this straight. You have testified that Plaintiff's Exhibit No. 8 reflects entries placed there each day as the transaction occurred; is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: Tell the Court and jury why did you not place on this record that you have produced here in evidence, Plaintiff's Exhibit 8—collections made by Mr. Roper upon claims [149] filed with the railroad company?

The WITNESS: They generally come in probably a year afterwards,—the following year,—if there is any—or he doesn't give me any record. In his report filed he shows the total receipts of the asparagus. It don't show railroad claims, but he received a total amount of money for the sale of the asparagus, and that appears in the record.

Redirect Examination.

By Mr. DINKELSPIEL:

The WITNESS: The reason why he did not attempt to ship or consign his asparagus directly to ultimate consignees and agents, such as John

(Testimony of George N. Edwards.)

Nix in New York, was that it is necessary in order to get the advantage of the best carload rates of freight to make up full carloads; and if he was shipping direct to the Eastern buyer he would have to solicit or go in the business of securing shipments from other sources in order to make up full carloads when the amount of asparagus he had for shipment that day would not do to make up the full carload. In order to receive the best prices for asparagus he would have to keep in daily wire communication with all the Eastern markets of the United States to ascertain the conditions there; that is a business within itself, which he did not consider within his province.

Mr. TORREGANO: We object to that on the ground it is self-serving, and is the conclusion and opinion of the witness as to what his province is about the sale of this asparagus. We move to strike out the answer.

The COURT: Same will be denied.

Mr. TORREGANO: Exception.

Recross Examination.

By Mr. TORREGANO:

The WITNESS: The checks from Roper with reference to refunds from railroad claims were turned over by him to his cashier and it [150] was entered in the books accordingly. In this case, the 1934 asparagus account would be credited with the amount and placed in the files of whatever year it

(Testimony of George N. Edwards.)

happens to be in, it goes in those files. He did not know whether it was called a separate record. He has a file for Roper. He was not positive whether he had an account in his books with Roper showing debits and credits of Roper's account with him. He was quite sure there was an account with Roper but it was just a minor matter. The money received from the railroad claims would be credited to the 1934 asparagus sales. The records, Plaintiff's Exhibit 8, did not indicate that there was a carload of asparagus shipped to any shipper on any one day. The name "Roper" after the entry (Plaintiff's Exhibit 8) means the car was originally shipped to Roper and later diverted, in this particular case to John Nix & Co. He is not positive whether or not he accepted Roper's accounting, or whether or not the checks made out by the railroad company came directly to him. The checks are always made payable to him. He was unable to give any definite amount as to how much would be involved in the railroad claims and he could only make a guess.

The COURT: Your best estimate, or is it merely a guess? [151]

The WITNESS: Just what I have received in past years, I do not recall now.

The COURT: What would it amount to?

The WITNESS: $40 or $50—I would not say.

The COURT: Speak out loud.

(Testimony of George N. Edwards.)

The WITNESS: It would probably amount to $40 or $50.00.

The COURT: Let's proceed.

Mr. TORREGANO: What was the last question?

The COURT: Read the question.

(Question read.)

Mr. TORREGANO: I move to strike that out on the ground it is purely speculative, expressing the conclusion and opinion of the witness; and the testimony affirmatively shows he is not in position to express his conclusion upon speculation.

The COURT: Motion to strike will be denied.

Mr. TORREGANO: Note an exception.

Redirect Examination.

By Mr. DINKELSPIEL:

Mr. DINKELSPIEL: From your experience as a shipper of asparagus to the Eastern markets—bunch asparagus—what has been, if you recall, the annual average of payments received from the railroad for claims filed,—if you know, at this time?

Mr. TORREGANO: I object to that as being incompetent, irrelevant and immaterial, and not binding upon these defendants, and not the best evidence.

The COURT: I will allow the question.

Mr. TORREGANO: I note an exception.

The WITNESS: I can't recall the exact amount.

The COURT: He is not asking you for the exact amount. [152]

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Will you please read the question?

The COURT: Read the question, Mr. Reporter.

(Question read.)

Mr. TORREGANO: We object on the further ground, if your Honor please, there is no foundation laid, and it does not show the volume of business done in that particular year to show what the annual charge would be, and it does not show the volume of business done in the time he wants the witness to average the annual charge. The 1934 year may be an exceptional one.

The COURT: I will allow the question.

Mr. TORREGANO: We note an exception.

Mr. DINKELSPIEL: May I change the question, then, to cover the period since he has been receiver for the Golden State Asparagus Company?

Mr. TORREGANO: We object, as it does not show the quantity of cars shipped nor the quantity involved during the time he was receiver.

The COURT: I will allow the question.

Mr. TORREGANO: Wait a minute. I note an exception.

The WITNESS: To the best of my recollections, the annual recovery from railroad claims would not exceed $100.

The COURT: And the volume or amount of shipments was about the same in 1934 as those other years?

The WITNESS: Prior years were more, your Honor.

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: At this time, if the Court please, I will again resume my offer as an exhibit in this case, of Plaintiff's Exhibit "E" for identification,—being Government reports produced by Mr. Edwards this morning.

Mr. TORREGANO: I object on the ground it is hearsay, incompetent, irrelevant and immaterial, and not the best evidence.

The COURT: The objection will be overruled, and it will be received as Plaintiff's Exhibit No. 9 in evidence. [153]

Mr. TORREGANO: We note an exception.

Said Plaintiff's Exhibit No. 9 consists of fifty-four [154] (54) mimeographed pages entitled the "Federal-State Market News Service; United States Department of Agriculture, Bureau of Agricultural Economics; California Department of Agriculture Market Information Service, Cooperating", purporting to contain reports by direct leased wire from important markets of sales on the dates shown to jobbers of asparagus shipped from California and other markets. The dates covered by said exhibit are:

1934—February 26, 27, 28.
March 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31.
April 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 28, 30.
May 1.

(Testimony of George N. Edwards.)

The markets designated in said exhibit are as follows:

Boston, Chicago, Kansas City, New York, Philadelphia, Pittsburgh, Baltimore, Atlanta, San Francisco, Washington, Los Angeles, Cincinnati, Portland, Oregon, Seattle, St. Louis, Minneapolis, Cleveland, Detroit.

The only prices quoted therein are the prices for which the following asparagus was stated therein to have been sold to the jobber at the markets specified:

Crated bunch asparagus classified as either jumbos, colossal, extra select, select, extra fancy, fancy, U. S. No. 1, either small, medium or large; [155]

Crated loose asparagus classified as either small, medium or large; U. S. No. 1, small, medium or large; U. S. No. 2, small, medium or large;

Loose per pound: Extra select, select, extra fancy and fancy; white, small, medium or large; green, small, medium or large.

(Testimony of George N. Edwards.)

One of the fifty-four (54) pages

(PLAINTIFF'S EXHIBIT No. 9)

which is in exactly the same form as the remaining pages, reads as follows:

"Federal-State Market News Service

United States Department of Agriculture, Bureau of Agricultural Economics. Room 1, Ferry Bldg., San Francisco, Calif.

California Department of Agriculture, Market Information Service, Cooperating. Tel. Exbrook 6317-18.

Monday, Feb. 26, 1934

Asparagus No. 1

Carlot shipments reported for Feb. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

Express Shipments										
Northern California		2	2	2	3	1	4	1	3	
Central California	1	2	3	2	2	1	4	4		
Imperial Valley						1			1	
Freight Shipments										
Northern California				3	1	2	6	6	3	
Central California					5	2		1	5	
	1	4	5	7	11	7	14	12	12	

Reports by Direct Leased Wire from important markets. This Morning's Sales to Jobbers—Unless Otherwise Stated.

Boston 14° Snowing. 2 Calif. arrived by express. No cars on track. Supplies moderate. Demand limited, market slightly weaker. Calif. Pyramid crates, dozen bunches, green, Extra select $5.50-6.50, Select $5-6; Extra fancy $4-4.50; fancy $3-4.

(Testimony of George N. Edwards.)

Chicago 7° Cloudy. 1 Calif. arrived by express, 1 car on track. Supplies moderate. Demand and trading slow on account of weather, Market unsettled. Very few sales —Calif. Dozen bunches, Northern District. Extra Select $5.50-6, Select $5-5.50, extra fancy $4-4.50, fancy mostly $4.00. Loose, medium to large, mostly $3-3.50, few best high as $4, small $2.50-2.75; Imperial Valley—Extra Select $3.75-4, Select $3.25-3.65; few $3.75-4; Extra fancy $3-3.25, fancy $2.50-2.75. [156]

Kansas City 1° below, Clear. Arrivals unreported. Supplies light. Practically no demand or trading, too few sales to establish market, dealers asking on Calif. dozen bunches, U. S. No. 1, medium to large, $5.50-6, U. S. No. 2 bulk, medium to large, $4.00.

New York 21° Snowing. 4 cars arrived, unloaded—4 Calif. express, no cars on track. Supplies moderate. Demand slow, market weak. Calif. Dozen bunches, Colossal to Jumbos $5-7, few higher, mostly around $6, Extra select $4.50-5; Select $3.50-4.50, mostly $4-4.25; Extra fancy $3.25-4, mostly $3.50-4, fancy $2.75-3.50. Loose, small to medium, $3-3.50, poorer, low as $2.25.

(Testimony of George N. Edwards.)

Philadelphia 19° Snowing. 3 Calif. arrived by express. No cars on track. Supplies liberal. Demand limited on account of weather, market weaker. Calif. Dozen bunches, Extra Select $4.50-5, very few higher, Select $4.50-5.50, short $4; Extra Fancy $4-5; short $4, fancy $2.50-3.75.

Pittsburgh 15° Snowing. No carlot arrivals, no cars on track. Supplies very light. Demand slow, market dull. Calif. Dozen bunches, large $6-6.50, medium $5.50-6, small $5-5.50; loose, small $5.00.

Baltimore 18° Sleeting. No carlot arrivals, no cars on track. California express receipts moderate. Supplies light. Demand limited, market unsettled. Calif. Doz. bunches: Green, large $5.50-6; medium $4-4.50; small $2.50-3.50.

Atlanta 30° Clear. Practically no supplies on market. Too few sales reported to quote. San Francisco 55° Partly Cloudy. 1899 crates green, 877 crates white arrived by truck. Supplies liberal. Demand moderate, market steady. Street Sales: per lb.—Sacramento—Delta, loose, white, large 9-10¢, medium 7-8¢, small 6-7¢, Green, large 10-11¢, few 12¢, medium 8-9¢, small 7-8¢.

Washington 19° Snowing. Express receipts very light, Supplies very light. Demand and trading limited, Market steady. Very few sales—Calif. Dozen bunches—Green $4-7 according to grade.

(Testimony of George N. Edwards.)

Los Angeles 54° Cloudy. No carlot arrivals; no cars on track. Truck receipts equiv. 1 car. L. C. L. express receipts equiv. 3 cars. Supplies liberal, demand slow, market weaker. Imp. Valley: Bunched, Crates, Select $2.50-2.75; few $2.25; extra fancy $2-2.25 mostly $2.25; Fancy mostly $2.00, unclassified, few $2.00. Delta: Loose, per lb., Select 12-13¢, some low as 11¢; Extra [157] Fancy 9-10¢, Fancy 8-9¢; Choice mostly 7¢; Some high as 8¢ and low as 6¢; Coachella Valley: Bunched, crates, Extra Fancy $2.50-2.75, Fancy $1.85-2. Local: Loose, per lb., Extra Fancy large 16-18¢, fancy 14-15¢.

W. F. COX
Local Representaive."

Released 12:15 P. M." [158]

Whereupon, plaintiff rested.

Mr. TORREGANO: At this time, we make the following motions on behalf of the defendants:

We move, if your Honor please, for an order to strike out from the record of the proceedings the following evidence or testimony: Testimony given by the plaintiff, George N. Edwards, and the witness Martin J. Dinkelspiel upon the ground that said testimony relates to a negotiation pertaining to a contract required by the statute of frauds to be

put in writing, and that the evidence in the case shows affirmatively that no contract was reduced to writing; that such evidence was and is irrelevant, incompetent and immaterial to the issues as presented by plaintiff's complaint on file.

That there is a variance between the pleadings and the proof in that the pleadings affirmatively allege that the defendants executed a contract in writing, whereas the testimony introduced by plaintiff shows affirmatively no contract in writing and signed by the parties as required under and pursuant to the provisions of the statute of fraud.

That all evidence introduced by plaintiff purporting to show the damages alleged to have been sustained by plaintiff as set forth in his said complaint upon the ground that said evidence so introduced by plaintiff is incompetent to prove damages, and that the evidence so introduced is irrelevant and immaterial to the issues of damages as presented by said plaintiff in his verified complaint; that said evidence is not the best evidence, is hearsay as against the defendants.

Does your Honor desire to rule upon the motion?

The COURT: Yes. Do you resist the motion, Mr. Dinkelspiel?

Mr. DINKELSPIEL: Yes, your Honor. [159]

The COURT: Same will be denied.

Mr. TORREGANO: We now, at this time, if your Honor please, move the Court for an order directing the jurirs to return a verdict in favor of the defendants and each of them, upon the following grounds:

First: that the evidence is insufficient to sustain a verdict or judgment in favor of plaintiff in that

it affirmatively shows that no contract in writing, as alleged in said complaint, was entered into by and between plaintiff and defendants for the sale by the plaintiff and the purchase by the defendants of bunch asparagus at $2 per crate f.o.b. Isleton, California;

Second: that it affirmatively appears from the evidence that the sole transactions had between plaintiff and defendant were negotiations looking towards the entering into of a contract for a sale by said plaintiff and the purchase by defendants of bunch asparagus.

Third: that it affirmatively appears from the evidence that the negotiations relative to the entering into of said contract between said plaintiff and defendants was for the purpose of having said plaintiff and defendant arrive as to the manner of payment of said asparagus when contracted for by said defendants. That said defendants and said plaintiff failed to negotiate a satisfactory arrangement to both of them as to the manner of payment for said asparagus.

Fourth: that it affirmatively appears from the evidence that plaintiff and defendants intended, prior to entering into any contract for the sale of asparagus by plaintiff to defendants, to reduce in writing said contract and obtain the approval of the Court thereon, and that said contract would not be binding upon either of the parties until such approval was obtained; there- [160] fore said purported contract lacks mutuality between the parties as required by law.

Fifth: that the evidence affirmatively shows that the plaintiff has failed to prove the damages alleged by him to have been suffered by reason of any alleged breach of contract upon the part of said defendants in that said evidence so introduced by plaintiff was and is irrelevant, incompetent and immaterial to prove damages; hearsay, and not the best evidence.

Sixth: that it affirmatively appears from the evidence introduced by plaintiff that plaintiff and defendants, after being unsuccessful in their negotiations toward entering into a contract for the sale of asparagus by plaintiff to defendants, said plaintiff and defendants mutually abandoned said negotiations and did not enter into a contract.

Seventh: that it affirmatively appears from the testimony introduced by plaintiff without contradiction that the telegrams introduced in evidence—Plaintiff's Exhibits Nos. 2 and 3—did not contain all the essential elements of the contract intended to be entered into between plaintiff and defendants in that said Plaintiff's Exhibits Nos. 2 and 3,—said telegrams,—did not contain a mutual agreement between the plaintiff and defendants as to the kind of asparagus to be sold by plaintiff and defendants, and a mutual agreement between the plaintiff and defendants as to the method of payment for said asparagus, when and if sold to defendants by plaintiff; and that the evidence further shows that the plaintiff did not intend to be bound by said telegrams until he obtained a court approval of the contract he was entering into; and that the evidence

further shows that the defendants did not intend to be bound by any negotiations towards the entering into of a contract until the contract had been reduced to writing and [161] signed by the parties.

I am prepared, if your Honor please, to abide by your Honor's directions in regard to the presentation.

Mr. DINKELSPIEL: We resist the motion.

The COURT: The motion for a directed verdict will be denied.

Mr. TORREGANO: May I have an exception to the order denying the motion to strike the evidence; and also an exception to the order denying the motion for a directed verdict?

The COURT: The record will show counsel's statement.

Mr. TORREGANO: And the record will show I am taking an exception to your Honor's ruling?

The COURT: The record shows exactly what counsel has said, I presume.

Mr. TORREGANO: Defendants rest. [162]

Whereupon the court gave to the jury the following instructions:

INSTRUCTIONS.

The COURT: You are here, Gentlemen of the Jury, for the purpose of trying solely the issues of fact presented in this case. It is my duty to state to you the law applicable to the case, and it is your duty to pass upon all questions of fact. You will distinctly understand that in this charge the Court

is in no manner or form expressing or desiring to express any opinion on the weight of the evidence, or any part of it, or the truth or falsity of any witness' testimony, or that any alleged fact is or is not proved.

Your power of judging of the effect and value of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

The Court cautions you to distinguish carefully between facts testified to by witnesses and statements made by the attorneys in their arguments of presentation as to what facts have been proved, and if there is a variance between the two you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified to by the witnesses, and you are to remember that the statements of counsel in their arguments are not evidence in the case.

It sometimes happens during the trial of a case that objections are made to questions asked, or to offers made to prove certain facts, which objections are sustained by the Court; and it sometimes happens that evidence given by a witness is stricken out by the Court on motion. In any of such cases you are instructed that in arriving at a verdict you are not to consider as evidence anything that has been stricken out by the Court, or anything offered to be proven or contained in any question to [163] which an objection has been sustained by the Court.

If counsel have stipulated or agreed to certain

facts you will regard the facts so stipulated to as being conclusively proved.

In determining the credibility of a witness you should consider whether his testimony is in itself contradictory, whether it has been contradicted by other credible witnesses, whether the statements are reasonable or unreasonable, whether they are consistent with other statements or with the facts established by evidence, or admitted facts. You may also consider the manner of the witness, the character of his testimony, the bias or prejudice, if any, manifested by him, his interest in or absence of interest in the suit, his recollections, whether good or bad, clear or indistinct, concerning the facts to which he testifies, his inclination or motive, together with the opportunity for knowing the facts whereof he speaks.

You are instructed that in arriving at a verdict you must not permit yourselves to be influenced in the slightest degree by sympathy, prejudice or any emotion in favor of or against either party or arrive at a verdict on mere suspicion or mere conjecture, but you must proceed solely upon the evidence introduced and the instructions of the court.

You are instructed that a witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or by his or her motives, or by contradictory evidence. If any witness examined before you has wilfully sworn falsely as to any material matter, you may disbelieve his or her entire testimony.

If the evidence is contradictory your decision must be [164] in accordance with the preponderance thereof. It is your duty, however, if possible to reconcile such contradictions so as to make the evidence reveal the truth.

When the evidence, in your judgment, is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party on whom rests the burden of proof.

In civic cases the affirmative of the issue must be proved. The affirmative of the issue is upon the plaintiff as to all affirmative allegations in the complaint. Upon the plaintiff, therefore, rests the burden of proof of such allegations.

You are the exclusive judges of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds against a less number.

The direct evidence of one witness is sufficient for proof of any fact in a civil case.

You are instructed the jury is not bound to believe anything to be a fact simply because a witness has stated it to be so, provided you feel from all the testimony the witness is mistaken or has testified falsely.

In civil cases a preponderance of the evidence is all that is required, and by this is meant such evidence as when weighed with that opposed to it has more convincing power and from which results the

greater probabilities in favor of the party upon whom the burden of proof rests.

In civil cases the affirmative of the issue must be proven. The affirmative here is upon the plaintiff as to all affirmative allegations of the complaint; the burden of proof is upon defendants as to all affirmative defenses set up in defendants' [165] answer. Therefore, upon plaintiff rests the burden of proof as to the allegations in the complaint and on the defendants as to the affirmative defenses contained in the answer.

You are instructed that it is admitted by the pleadings, the second answer of defendants, that on February 13, 1934, plaintiff offered to sell defendants all asparagus shipped by plaintiff f.o.b. Isleton, California, at two dollars per crate up to and including April 10, 1934, provided a satisfactory bank guarantee was given immediately to insure payment of all drafts as against all shipments to defendant. If you find from the evidence that defendants accepted this offer but failed to execute, or refused to furnish said guaranty, your verdict shall be for plaintiff.

You are instructed that in legal contemplation a contract is an agreement between two or more persons upon sufficient consideration to do or not to do a particular thing. In other words, to make a contract there must be an offer by one party for a sufficient consideration, to do or not to do a particular thing, and there must be an acceptance by the other party of that offer, and this offer and accept-

ance must be equally binding upon both parties to the agreement and must be to do or not to do a particular thing.

You are instructed that a valid and binding contract may be made by the exchange of letters or telegrams. To constitute a binding contract made in the form of letters or telegrams the proposal or offer by the one party must be accepted by the other party upon the terms offered and without qualification. In order to constitute a binding contract the acceptance must be absolute and unqualified.

Where parties through written correspondence reach a specific and definite agreement, intending that the agreement [166] shall be subsequently expressed formally in a single paper, which shall be the evidence of what has been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract.

You are instructed that where one party agrees to perform a contract or any condition in a contract to the satisfaction of the other, the latter is the sole judge as to whether the contract is performed to his satisfaction, provided such satisfaction is that which a reasonable person would exact, and provided he acts in good faith, and that his dissatisfaction is actual and not pretended.

You are instructed that the plaintiff in support of the allegations of his complaint has introduced in evidence two telegrams, one addressed from the

plaintiff to the defendants and the other from the defendants to the plaintiff. For the purpose of explaining the terms used by the parties, evidence has been introduced. The Court instructs you that if you find from the evidence that the plaintiff offered to sell all of the asparagus grown by the Golden State Asparagus Company during the period specified in the telegram sent by the plaintiff, and the defendant by its telegram offered to purchase all bunch asparagus grown by the Golden State Asparagus Company during the time specified in the telegrams, then you are to determine from the evidence if the plaintiff and defendants understood the same thing as to what was being offered for sale and what was agreed to be purchased.

If you find from the evidence that the meaning placed upon the term "satisfactory bank guarantee" by plaintiff is different than that placed by the defendants, and if you find that the minds of the plaintiff and defendants did not meet as to the [167] meaning of the words "satisfactory bank guarantee" used in plaintiff's telegram, then the Court instructs you that no contract was entered into between plaintiff and defendants, and your verdict, therefore, must be for the defendants.

You are instructed if a phrase has no ascertainable meaning and was in fact differently understood by the parties, then there is no meeting of minds.

You are instructed that any uncertainty existing in an agreement is to be interpreted most strongly

against the one who prepares the instrument and causes the uncertainty.

Confirmation implies a deliberate act intended to renew or ratify a transaction that would be otherwise unenforceable.

If you therefore find from the evidence that plaintiff in sending his wire under date of February 12, 1934, to the defendant confirmed a verbal understanding or agreement, and that the defendant with full knowledge of that prior understanding sent his telegram under date of February 13, 1934, in acknowledgment of plaintiff's telegram, and also confirming said transactions, you will find in favor of the plaintiff.

It is admitted by defendants that defendant M. H. Rothstein is a co-partner of the partnership doing business under the firm name and style of H. Rothstein & Son, defendants herein.

You are instructed that every partner is an agent of the partnership for the purpose of its business, and the acts of every partner, and instruments executed by him for apparently the purpose of carrying on the usual way of business of the partnership is binding on the partnership.

Where a person voluntarily puts it out of his power to do what he agreed to do he breaks his contract; that is called an anticipatory breach of contract, and such person is immediately [168] liable to be sued for such breach without demand, even though the time specified for the performance of the contract has not expired.

You are instructed that the rule that an agreement in writing supercedes all prior or contemporaneous oral negotiations, and that such prior negotiations can not be introduced to contradict, add to or vary the terms of a written instrument, has an exception where the contract is uncertain or ambiguous upon its fact, resort may be had to prior oral negotiations to ascertain the intention of the parties to aid in the construction and interpretation of the contract.

For the purpose of determining what the parties to this litigation intended by the language used, it is competent to show, not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties *duc*ing the negotiations at and before the time of the execution of the contract may be shown.

If, therefore, you find from the evidence surrounding the transmission of said telegrams, that the parties understood the term "bunch asparagus" to be "all asparagus shipped" f.o.b. cars Isleton, to be the same kind of asparagus, the parties will be held to have so intended, and such intention as indicated may be gathered from the surrounding circumstances.

It is a general rule that when there is a known usage in the trade persons carrying on that trade are deemed to have contracted in reference to the

usage unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means [169] of interpretation where it does not alter or vary the terms of the contract.

In order to be of any binding force, custom and usage must be reasonable and must be general as to place and not confined to any particular concern or business house.

A person is not bound by custom or usage unless he has actual knowledge thereof or that it is so general or well known in the community as to give rise to the presumption of such knowledge. The general usages of a particular trade or business are presumed to be known to those engaged in it and if known the parties are held to have contracted with reference to them unless the contrary appears.

A custom inconsistent with the terms of a written contract is not a proper subject matter of defense. Where a contract contains an express provision and a custom or usage exists inconsistent therewith, the custom and usage must give way to the express provision of the contract. A custom or usage is applied only when the contract is silent on the subject.

A compromise is an agreement between two or more persons who, to avoid a law-suit, amicably settle their differences on such terms as they can agree upon; it is an adjustment of matters in dispute by mutual consent without resort to law.

An attempt, however, or mere effort to compromise, does not constitute a compromise. It is not

an admission of an existing liability, or that a contract does not in fact exist, and can not be considered by the jury at all in arriving at a verdict.

You are instructed that if you find that plaintiff is entitled to recover damages from defendants, you must determine the amount of damages from the evidence admitted by the Court and not by mere conjecture. [170]

You are instructed that the burden of proving the extent of damages is on the person claiming the damages.

You are instructed that the measure of plaintiff's damage, in the event you find that defendants breached the contract with plaintiff, is the difference between what defendants contracted to pay for the asparagus and the market value thereof at the time when the asparagus ought to have been accepted.

You are instructed that the price at which the asparagus was sold does not determine the market value of the asparagus at the time of the sale thereof, but is admissible as evidence in the determining of such market value.

You are instructed that if you find from the evidence that the terms "all asparagus" and "all bunch asparagus" have a different meaning to the parties to the negotiations and was not mutually understood by them, then you are instructed that as the telegram from plaintiff offered to sell "all asparagus shipped", and the telegram of defend-

ants offered to buy "all bunch asparagus" that there was no acceptance of the offer as made by plaintiff, and, therefore, th*ey* unless you find from the evidence that plaintiff accepted a counter-offer of defendants to purchase "all bunch asparagus" and communicated to defendants his acceptance of defendants' offer, then your verdict must be for the defendants.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

You are instructed that in order for the plaintiff to be entitled to recover any damages from the defendants you must first find that plaintiff and defendants entered into the contract set forth in plaintiff's complaint; that the contract was no abandoned, and that the defendants breached the contract and that as a result of the breach the plaintiff suffered a damage. [171]

The Court instructs you as a matter of law that if you should find from the evidence that plaintiff and defendants entered into a contract and thereafter plaintiff, by his actions and words, led defendants, as reasonable and prudent persons, to believe that plaintiff intended to abandon further dealings with defendants with reference to the sale of the asparagus mentioned in plaintiff's complaint and if you find from the evidence that defendants, by their words and actions expressed themselves as consenting to the abandonment, then you must find that the plaintiff and defendants consented

that the contract be rescinded and your verdict must be for defendants.

Mr. TORREGANO: Does that complete your charge?

The COURT: I have not completed my charge. Gentlemen, upon retiring to the jury room it will be your duty first to select a foreman and then proceed to your deliberations. In the Federal Court, both a *vicil* case and in a criminal case, it is necessary that any verdict be one that is not only the verdict of the jury as a whole, but of each and every juror; in other words, a Federal verdict must be unanimous. One juror can prevent a jury from having an unanimous verdict. I am submitting to you two forms of verdict—"We, the jury find, in favor of the plaintiff and assess the damages against the defendants in the following sum." If you should reach that verdict you will insert the amount and it will be signed by your foreman. The form of the other verdict is: "We, the jury, find in favor of the defendants." If you find that verdict it should be signed by your foreman. Any judgment in this case would have to be limited to the prayer, which is, as it has been stipulated by counsel for the plaintiff, not in excess of $7,604.02 as requested. Now, Mr. Torregano. [172]

Mr. TORREGANO: If your Honor please, may I at this time enter a formal exception to your Honor giving plaintiff's instructions Numbers 4, 8, 14, 23 and 24, and also to your Honor's refusal

to give the instructions as proposed by the defendants, Numbers 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 39—refusal to give them as proposed or give them as modified.

The COURT: Have you any objections?

Mr. DINKELSPIEL: No, your Honor.

The COURT: I might say the failure of the Court to give those instructions is either due to the fact I feel they are covered by the instructions given, or they are erroneous, and I also call counsel's attention to the fact that all instructions referred to by counsel before, by counsel for the defense, were offered in violation of Rule 40, and I also deem that a reason or excuse for not giving them. I presume there is no objection if the jury call for any exhibits for the jury to receive them—that are now in evidence.

Mr. TORREGANO: No.

Mr. DINKELSPIEL: No." [173]

Whereupon, the jury retired to consider of their verdict, and subsequently returned into court their verdict in favor of the plaintiff and against the defendants Henry Rothstein, M. H. Rothstein, and I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership, which said verdict is in words and figures as follows:

"[Title & Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff

and asses(s) the damages against the Defend-
five EHC
ants in the sum of Seven thousand six hundred
EHC two EHC
seventy four dollars and fifteen cents.
Dollars $7674-15/100
$7504-02/100

EDWARD H. CLARK, JR.,
Foreman."

Thereupon, on the 1st day of November, 1935, judgment upon the verdict of the jury was entered in favor of plaintiff, George N. Edwards, as receiver in equity of Golden State Asparagus Company, a corporation, and against the defendants Henry Rothstein, M. H. Rothstein, I. Rothstein, John Doe and Richard Roe, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership, together with costs expended, taxed at Fifty-eight and 35/100 Dollars ($58.35).

Thereafter, on the 8th day of November, 1935, a motion for a new trial was filed herein, reading as follows:

"[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Now come HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership, [174] defendants in the above entitled action, and move the above entitled court for an order setting aside the ver-

dict and judgment herein, and granting a new trial of the above entitled cause for the following reasons, to-wit:

A. That the evidence is insufficient to support the verdict upon the following grounds:

1. That plaintiff's cause of action is based upon the alleged breach of a contract in writing, whereas the evidence affirmatively discloses that no contract in writing was entered into by and between plaintiff and defendants as alleged in plaintiff's complaint.

2. That the writings introduced in evidence by plaintiff upon which plaintiff based his cause of action affirmatively disclose that the plaintiff and defendants were not to be bound thereby until a written contract was prepared and signed by said parties. The evidence affirmatively discloses that a written contract was prepared by plaintiff but was not signed by either plaintiff or defendants.

3. That it affirmatively appears from the evidence that plaintiff and defendants abandoned all negotiations with reference to the contract upon which plaintiff's cause of action is based.

4. That it affirmatively appears from the evidence that the records of the plaintiff introduced in evidence (Plaintiff's Exhibit No. 8) in order to prove the alleged damages suffered by plaintiff as a result

of the alleged breach of contract by the defendants did not constitute a true and correct report and account of all monies received by said plaintiff from the sale of the asparagus, the subject matter of plaintiff's cause of action, in that said records did not include monies received from railroad companies upon claims filed with reference to said asparagus. [175]

5. That it affirmatively appears from the evidence that the said records introduced by plaintiff in order to prove the alleged damages were not the original and regular books of account kept by plaintiff of the monies received from the sale of the asparagus, the subject matter of plaintiff's cause of action.

6. That it affirmatively appears from the evidence that the records introduced in evidence (Plaintiff's Exhibit No. 8) in order to prove the said alleged damages suffered by plaintiff were prepared from figures and data not within the knowledge of plainitff, but were furnished to plaintiff by a third person, not in the employ of plaintiff.

7. That it does not appear from the evidence that the price for which said asparagus was sold was the prevailing market price at the time of sale.

8. That it affirmatively appears from the evidence that neither plaintiff nor the

defendants were to be bound by any writings or dealings had by and between them until such time as the approval of the court was obtained thereto. That it affirmatively appears that no contract was ever tendered to the court for approval.

B. The evidence shows that a verdict should have been rendered in favor of the defendants and that the verdict as rendered is contrary to law for the following reasons:

1. That the plaintiff's cause of action is based upon the breach of a written contract involving more than Five Hundred ($500.00) Dollars. That the evidence shows that no contract in writing signed by the parties to be charged therewith was ever entered into.

2. That the writings introduced in evidence by plain- [176] tiff upon which plaintiff's cause of action is based affirmatively show that the plaintiff and defendants were not to be bound thereby until a written contract was prepared and signed by said parties. The evidence affirmatively discloses that a written contract was prepared by plaintiff, but was not signed by either plaintiff or defendants.

3. That it affirmatively appears from the evidence that plaintiff and defendants abandoned all negotiations with reference to the contract upon which plaintiff's cause of action is based.

4. That it affirmatively appears from the evidence that the records of the plaintiff introduced in evidence in order to prove the alleged damages suffered by plaintiff as a result of the alleged breach of contract by the defendants did not constitute a true and correct report and account of all monies received by said plaintiff from the sale of the asparagus, the subject matter of plaintiff's cause of action, in that plaintiff had not received an accounting from the railroad companies upon claims filed with reference to said asparagus.

5. That it affirmatively appears from the evidence that the records introduced by plaintiff in order to prove the alleged damages were not the final and regular book of account kept by plaintiff of the monies received from the sale of the asparagus, the subject matter of plaintiff's cause of action.

6. That it affirmatively appears from the evidence that the records introduced (Plaintiff's Exhibit No. 8) in order to prove the said alleged damages suffered by plaintiff were prepared from figures and data not within the knowledge of plaintiff, but were furnished to plaintiff by a third person, not in the employ of plaintiff.

7. That it does not appear from the evidence that the [177] price for which

said asparagus was sold was the prevailing market price at the time of sale.

8. That it affirmatively appears from the evidence that neither plaintiff nor the defendants were to be bound by any writings or dealings had by and between them until such time as the approval of the court was obtained thereto. That it affirmatively appears that no contract was ever tendered to the court for approval.

C. Errors in Law occurring at the trial:

1. That the court erred in not granting defendant's motion for a directed verdict in that the writings upon which plaintiff predicated his cause of action did not constitute a contract by and between plaintiff and defendants.

2. That the court erred in permitting parol evidence to be introduced to show the preliminary negotiations had by and between plaintiff and defendants with reference to the essential terms of the alleged contract upon which plaintiff's cause of action was based.

3. That the court erred in permitting the introduction of parol evidence to show the intent of the parties with reference to the essential terms of the alleged contract upon which plaintiff's cause of action was based.

4. That the court erred in admitting in evidence the "Federal Market News"

(Plaintiff's Exhibit No. 9), as the contents of said exhibit were incompetent to show market value at the time of the sale of the said asparagus.

5. That the court erred in admitting in evidence the records of plaintiff (plaintiff's Exhibit No. 8) in order to prove the alleged damages suffered by plaintiff as the result of the alleged breach of contract by defendants in that said records [178] did not constitute the original and regular book of account kept by plaintiff of the monies received from the sale of the asparagus, the subject matter of plaintiff's cause of action.

6. That the court erred in admitting in evidence the records of plaintiff (Plaintiff's Exhibit No. 8) in that it affirmatively appears from the evidence that said records did not contain a complete account of all monies received by plaintiff from the sale of said asparagus as said records did not include monies received by plaintiff from claims filed with said railroad companies with reference to said asparagus.

7. That the court erred in admitting in evidence the records of plaintiff (Plaintiff's Exhibit No. 8) in order to prove the alleged damages suffered by plaintiff in that it affirmatively appears from the evidence that said records were prepared by plaintiff from figures and data not within

the knowledge of plaintiff but were furnished to plaintiff by a third person, not in the employ of plaintiff.

8. That the court erred in admitting in evidence the telegram sent by defendants to plaintiff (Plaintiff's Exhibit No. 3) for the reason that said telegram did not constitute an acceptance of the offer contained in plaintiff's telegram (Plaintiff's Exhibit No. 2).

9. That the court erred in refusing to admit in evidence the telegram received by defendant M. H. Rothstein (Defendants' Exhibit B for Identification) in reply to the telegram dictated by Martin Dinkelspiel, Esq., one of the attorneys for plaintiff, and sent to the defendants at their Philadelphia office, in that said telegram disclosed that defendants were willing to comply with the request of plaintiff with reference to furnishing a satisfactory bank guarantee. [179]

10. That the court erred in refusing to admit in evidence the letter dictated by said Martin J. Dinkelspiel, Esq., and forwarded to the defendants at their office in Philadelphia (Defendants' Exhibit C for Identification) in that said letter conclusively showed that plaintiff at all times was negotiating with defendants for the sale of all of his asparagus and not all of his bunch asparagus as alleged in his complaint.

11. That the court erred in refusing to admit in evidence the letter written by said Martin J. Dinkelspiel, Esq., to the Philadelphia attorneys for defendants (Defendants' Exhibit E. for Identification), in that said letter further showed that plaintiff had negotiated with defendants for the sale of all asparagus and not all bunch asparagus as alleged in his complaint.

12. That the court erred in not admitting in evidence copies of the drafts used by defendants in the transaction of their business (Defendants' Exhibit A. for Identification), as said drafts evidenced the usual practice of the defendants in the arranging of a satisfactory bank guarantee.

13. That the court erred in giving plaintiff's instruction No. 4 for the reason that said instruction dealt with the question of compromise which was not an issue in the proceedings and said instruction permitted the jury to disregard the proposed written contract. (Plaintiff's Exhibit No. 7).

14. That the court erred in giving plaintiff's instruction No. 8 in that said instruction instructed the jury to find in favor of the plaintiff and against defendants if they found that the defendants orally accepted the offer of plaintiffs and refused to furnish the bank guarantee.

15. That the court erred in giving plaintiff's instruction No. 14 in that said in-

struction instructed the jury to find [180] that it was within the sole province of the plaintiff to determine what was a satisfactory bank guarantee.

16. That the court erred in giving plaintiff's instruction No. 23 in that said instruction instructed the jury to find that if the defendants in sending their telegram (Plaintiff's Exhibit No. 3) confirmed a verbal understanding, then the jury could find in favor of the plaintiff. This instruction is contrary to law in that the intent and understanding of the parties as to all the material elements must be shown by the writings.

17. That the court erred in giving plaintiff's instruction No. 24 in that said instruction instructed the jury to ascertain the intent of the parties from oral evidence. Plaintiff's cause of action being within the statute of frauds, it was necessary for the jury to ascertain the intention of the parties as to the essential terms of the alleged contract from the writings alleged to constitute a written contract.

18. That the court erred in refusing to give defendants instruction No. 12 in that the court should have construed the writings and advised the jury the meaning thereof.

19. That the court erred in refusing to

give defendants' instruction No. 13 in that the court should have instructed the jury that if they found from the evidence that plaintiff and defendants had not agreed upon the meaning of the words used by them in their telegram (Plaintiff's Exhibits No. 2 and 3), then no contract was entered into between plaintiff and defendants.

20. That the court erred in refusing to give defendants' instruction No. 14 in that the jury should have been instructed that an acceptance of an offer must in every respect correspond with the offer.

21. That the court erred in refusing to give defend- [181] ants' instruction No. 15 in that the jury should have been instructed that if they found from the evidence that the term satisfactory bank guarantee was too uncertain to be ascertained, then no contract was entered into.

22. That the court erred in refusing to give defendants' instruction No. 18 in that the jury should have been instructed that defendants' telegram (Plaintiff's Exhibit No. 3) constituted a counter-offer to the plaintiff, and that unless the jury found that said counter offer was accepted by plaintiff and communicated to defendants, then no contract was entered into.

23. That the court erred in refusing to give defendants' instruction No. 21 in that

the court should have instructed the jury that if they found from the evidence that there was a misunderstanding as to the manner in which payment for the asparagus was to be guaranteed, then no contract was entered into.

24. That the court erred in refusing to give defendants' instruction No. 22 in that the court should have instructed the jury that unless they found from the evidence that the term "satisfactory bank guarantee" had a meaning agreed upon by plaintiff and defendants, then said term must be interpreted according to the custom and usage of the produce trade.

25. That the court erred in refusing to give defendants' instruction No. 23 in that the court should have instructed the jury that if they found from the evidence that the defendants offered to post a satisfactory bank guarantee according to trade custom and usage, then there was no breach of contract by defendants.

26. That the court erred in refusing to give defendants' instruction No. 24 in that the court should have instructed the jury that if they found from the evidence that the plaintiff [182] did not communicate to the defendants an acceptance of defendants' counter-offer (Plaintiff's Exhibit No. 3), then no contract was entered into.

27. That the court erred in refusing to give defendants' instruction No. 25 in that the court should have instructed the jury that if they found from the evidence that plaintiff and defendants did not agree as to the meaning of guaranteeing payment of the asparagus, the subject matter of plaintiff's action, then no contract was entered into between plaintiff and defendants.

28. That the court erred in refusing to give defendants' instruction No. 26 in that the court should have instructed the jury that if they found from the evidence that according to usage and custom of the produce trade it was necessary for the parties to a contract before same was consummated to agree as to the specifications of the asparagus sought to be sold and that plaintiff and defendants had not so agreed, then no contract was entered into.

29. That the court erred in refusing to give defendants' instruction No. 28 in that the court should have instructed the jury that if they found from the evidence that the essential parts of the intended agreement between plaintiff and defendants were to be determined by future negotiations and that the minds of the parties did not meet as to said essential parts, then no contract was entered into.

30. That the court erred in refusing to give defendants' instruction No. 29 in that

the court should have instructed the jury that if they found from the evidence that the written contract tendered by plaintiff to defendants embodied terms additional to those agreed upon by plaintiff and defendants, then no contract was entered into.

31. That the court erred in refusing to give defend- [183] ants' instruction No. 30 in that the court should have instructed the jury that if they found from the evidence that plaintiff and defendants intended that their agreement would be reduced to a written contract, and that the parties failed to agree upon the terms of said written contract, no contract was entered into.

32. That the court erred in refusing to give defendants' supplemental instruction No. 1 in that the court should have instructed the jury that if they found from the written contract tendered by plaintiff to defendants embodied terms additional to those agreed upon by plaintiff and defendants, then no contract was entered into.

33. That the court erred in refusing to give defendants' supplemental instruction No. 2 in that the court should have instructed the jury that if they found that in accordance with usage and custom of produce dealers it was necessary for a contract for the sale and purchase of asparagus to include the specifications of the asparagus, and that no contract was signed by plaintiff

and defendants wherein the specifications were set forth, no contract was made between plaintiff and defendants.

34. That the court erred in refusing to give defendants' supplemental instruction No. 3 in that the court should have instructed the jury that if they found from the evidence that there was to be no contract biding upon either plaintiff or defendants until the contract was approved by the above entitled court, and that the court's approval had never been obtained, then no contract was entered into between plaintiff and defendants.

D. That Martin J. Dinkelspiel, Esq., one of the attorneys for the plaintiff, was guilty of misconduct in that when demand was made upon him during the course of the trial for the production of the written contract prepared by him (Plaintiff's Exhibit No. 7), [184] counsel stated that he had none; that thereafter while a witness in the above proceedings said Martin J. Dinkelspiel produced and introduced in evidence the written contract prepared by him, the production of which defendants had theretofore demanded.

E. That defendants were taken by surprise in the trial of the above action in that prior to said trial defendants made demand upon plaintiff for the inspection of the writings upon which plaintiff's cause of action was based, and received from the attorney for plaintiff copies

of the two telegrams introduced in evidence. (Plaintiff's Exhibits 2 and 3). That no copy of the contract prepared by counsel for plaintiff (Plaintiff's Exhibit No. 7) was tendered to defendants.

F. That the jury was guilty of misconduct in that it affirmatively appears from the record that the jurors arrived at the amount of damages to be allowed to plaintiff by chance and conjecture.

This motion is based upon all the pleadings, papers and exhibits on file herein, the points and authorities in support thereof, reporters transcript, and upon the verdict of the jury.

Dated this 8th day of November, 1935.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants. [185]

Thereafter, on the 5th day of December, 1935, an order was made and entered by the above entitled court denying defendants' motion for a new trial.

Thereafter, pursuant to stipulation of counsel for plaintiff and defendants, the above entitled court made and entered the following order:

"It appearing to the Court that a stipulation has been filed herein by and between the attorneys for the plaintiff and the attorneys for defendants Henry Rothstein, M. H. Rothstein, I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, a copartnership, extending the time within which the defendants may

present a proposed form of Bill of Exceptions, and

It further appearing to the Court that the term is about to expire and that the additional time is necessary,

It is hereby ordered and adjudged that the defendants have to and including the 13th day of February, 1936, within which to present a proposed Bill of Exceptions and that the plaintiff may have ten (10) days after the service of said proposed Bill of Exceptions, or such further time as may be allowed by stipulation or order of Court, within while to file objections thereto, and that the same shall thereafter be settled,

It is further ordered and adjudged that the term of court be and the same is hereby extended for a period of three (3) months from the date of this order for the completion of all necessary matters to perfect the record in this cause and for the consideration and settlement of all matters relating thereto, including the settlement of the bill of exceptions and other matters for the perfection of an appeal in said cause, and the court does hereby retain jurisdiction of said cause and of all matters connected therewith for the purpose of completing the record in said cause.

December 13th, 1935.

HAROLD LOUDERBACK
Judge of the United States
District Court."

Thereafter, and within the time allowed by law and as granted by the court, defendants presented their proposed Bill of Exceptions.

Thereafter, on the 24th day of February, 1936, the above [186] entitled court made and entered its order extending the time within which to file the record and docket the cause in the above entitled action in the United States Circuit Court of Appeal for the Ninth Circuit to and including the 29th day of March, 1936, and said court made its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 20th day of May, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 22d day of July, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 23d day of September, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 24th day of November, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

That within the time allowed by law and the orders of the above entitled court, and after notice given as required by law, said proposed Bill of Exceptions and the proposed amendments, additions and corrections thereto were presented to the above en- [187] titled court for settlement.

Dated: December 10, 1936.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants.

IT IS HEREBY STIPULATED that the foregoing Bill of Exceptions were prepared within the time allowed by law and correctly sets forth all of the proceedings had and is correct in all respects and may be approved, allowed and settled.

Dated: December 10, 1936.

DINKELSPIEL & DINKELSPIEL
By DAVID K. LENER
Attorneys for Plaintiff
TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants

The undersigned Judge, who tried the above entitled cause, hereby certifies that the above and fore-

going Bill of Exceptions contains all of the evidence given or offered on the trial of the said cause and correctly shows all of the proceedings had on said trial and is correct in all respects; and said Bill of Exceptions is hereby approved, allowed and settled and made a part of the record herein within the time allowed by rules of court and extensions duly allowed pursuant to said rules.

Dated: December 10th, 1936.

HAROLD LOUDERBACK
Judge of the United States
District Court. [188]

[Endorsed] Filed Dec 27 1935.

Receipt of a copy of the within Petition for Appeal is hereby admitted this 27 day of December, 1935.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL.

Now come HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SONS, a copartnership, the defendants above named, and petition this Court for an appeal herein, and respectfully shows: [189]

That this is an action for damages for breach of contract. That said action came on for trial in the above entitled court before the court sitting with a jury. After the introduction of the evidence, the argument of counsel, and the instructions of the Court, the jury returned its verdict in favor of the plaintiff and against the said defendants, and judgment upon said verdict was entered in the above entitled court on the 1st day of November, 1935, said judgment being in the sum of Seven Thousand Five Hundred Four and 02/100 Dollars ($7,504.02), with plaintiff's costs taxed at the sum of Fifty-eight and 35/100 Dollars ($58.35). That defendants' petition for a new trial duly filed herein was denied on December 5, 1935.

That the above named defendants, feeling aggrieved by the said judgment and the proceedings had prior thereto in said cause, desire to appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and the reasons for their said appeal are set forth in their assignment of errors filed herewith, all of which errors were committed in said cause to the prejudice of said defendants.

WHEREFORE, defendants pray that their appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of said errors so complained of, and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based and rendered, duly authenticated, be sent to the said Circuit Court of

Appeals under the rules of said court in such cases made and provided; and that said cause may be reviewed and determined and said judgment, and every part thereof, reversed, set aside and held for naught and judgment entered in favor of defendants and against plaintiff, and for such further relief or remedy [190] in the premises as the Court may deem appropriate.

Dated this 26th day of December, 1935.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants.

ORDER ALLOWING APPEAL

The foregoing appeal is hereby allowed this 28th day of December, 1935, upon the giving of a bond as required by law in the sum of Two Hundred Fifty Dollars ($250.00) for costs.

HAROLD LOUDERBACK
District Judge. [191]

[Endorsed]: Filed Dec 27 1935.

Receipt of a copy of the within Assignment of Errors is hereby admitted this 27 day of December, 1935.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Now come defendants HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually, and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership, appellants herein, and make and file this, their Assignment of [192] Errors.

1. The court erred in denying defendants' motion for a directed verdict made after plaintiff rested his case, in that plaintiff had failed to introduce evidence sufficient to go to the jury in that the uncontradicted evidence offered by plaintiff disclosed that plaintiff and defendants had never entered into a written contract for the sale of asparagus and that all negotiations had between plaintiff and defendants were preliminary to the execution of a contract which was never executed.

2. The Court erred in denying defendants' motion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that the uncontradicted evidence offered by plaintiff and defendants disclosed that plaintiff and defendants had never entered into a contract for the sale of asparagus and that all negotiations had between plaintiff and defendants were preliminary to the execution of a written contract which was never executed and which negotiations were mutually abandoned.

3. The Court erred in denying defendants' mo-

tion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that plaintiff failed to introduce competent evidence to prove the alleged damages suffered by him.

4. The Court erred in holding that there was any evidence of a contract upon the part of defendants sufficient to go to the jury in that the uncontradicted evidence discloses that plaintiff and defendants had never entered into a contract as alleged in plaintiff's complaint, or at all.

5. The Court erred in holding that there was sufficient evidence of damages suffered by the plaintiff to go to the jury [193] in that the record discloses that plaintiff failed to prove the alleged damages suffered by him.

6. That the evidence is insufficient to support the verdict and judgment in that it shows that plaintiff and defendants never entered into a contract for the sale of asparagus and that plaintiff had failed to prove the damages alleged to have been suffered by him.

7. There is no evidence that plaintiff and defendants were to be bound by the two telegrams, "Plaintiff's Exhibits 2 and 3" in that the undisputed evidence shows that plaintiff and defendants were not to be bound until a contract in writing was prepared and signed by plaintiff and defendants and approved by the above entitled court; that although a contract in writing was prepared by the attorneys for plaintiff, "Plaintiff's Exhibit 7", it was not signed by either plaintiff or defendants or approved by the court.

8. There is no evidence that plaintiff suffered damages in the sum of Seven Thousand Five Hundred Four and 02/100 Dollars ($7,504.02), the verdict of the jury and the judgment entered herein, in that the undisputed evidence showed that plaintiff's records, "Plaintiff's Exhibit 8", upon which plaintiff relied to show damages, did not contain a true statement of all moneys collected and due plaintiff from the sale of the asparagus, the subject matter of this action.

9. There is no evidence that the price received by plaintiff for bunched asparagus, the subject matter of this action, was the then prevailing market price, in that there was no competent evidence of the then prevailing market price. [194]

10. That the uncontradicted evidence in the case shows that plaintiff and defendants did not enter into a contract for the sale of asparagus but had certain preliminary negotiations for the execution of a written contract, which negotiations were abandoned.

11. That it appears from the face of the record that the verdict resulted from conjecture and chance in that there was no competent evidence introduced from which the jury could have found damages in the amount rendered in its verdict.

12. That the Court erred in admitting into evidence over the defendants' objection and exception testimony of the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract except as to the price

at which the asparagus was to be sold, in that plaintiff's cause of action was based solely upon a contract in writing.

13. That the Court erred in admitting into evidence over defendants' objection and exception plaintiff's Exhibit No. 3, consisting of a telegram sent by defendants to plaintiff, stating that defendants will arrange to guarantee payment for all bunch asparagus at the price mentioned and that plaintiff could draw up a contract between them in that said telegram did not constitute an acceptance of plaintiff's offer to sell asparagus to defendants.

14. That the Court erred in admitting into evidence over the defendants' objection and exception plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, in that [195]

(a) Plaintiff's Exhibit 8 was not prepared by plaintiff from data or figures within his knowledge.

(b) Said exhibit was prepared without the knowledge of defendants.

(c) Said Exhibit did not constitute a true and correct report and account of all moneys received by and due to plaintiff from the sale of the asparagus referred to in plaintiff's complaint; and

(d) Said Exhibit was not an original, permanent and regular book of account kept by plaintiff.

15. The Court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit No. 9, which consists of papers entitled "The Federal Market News" and purporting to show the market value of the asparagus sold by plaintiff at the time of the sale thereof, in that said papers were not certified as authentic by the United States Department of Agriculture.

16. That the Court erred in permitting plaintiff to testify over the objection and exception of defendants that he believed he was obligated to deliver the asparagus to defendants on defendants furnishing him with a satisfactory guarantee, in that the plaintiff's belief as to his rights was immaterial to the determination of the existence of a contract and that the admission of such testimony permitted the jury to believe that plaintiff's belief was evidence of the existence of a contract.

17. That the Court erred in admitting into evidence over the defendants' objection and exception testimony of the plaintiff to the effect that he believed that the entire contract between himself and the defendants was embodied in plaintiff's Exhibits 2 and 3, which answer was given in response to a ques- [196] tion by the court, in that the belief of the plaintiff could have no bearing on the question as to whether or not a contract had been entered into and the question having been put by the court, it tended to influence the jury to believe that said question and answer were material in determining the existence of a contract.

18. That the Court erred in refusing to admit into evidence on behalf of defendants, to which refusal defendants noted an exception, defendants' Exhibit "A" for identification consisting of copies of drafts and letters of credit showing the usual practice of the defendants in arranging satisfactory bank guarantees, in that said evidence would have disclosed what defendants understood by the term "satisfactory guaranty" as said term was used in Plaintiff's Exhibit 3.

19. That the Court erred in refusing to admit into evidence on behalf of defendants, to which refusal defendants noted an exception, defendants' Exhibit "C" for identification, consisting of a letter sent by Martin J. Dinkelspiel, Esq., to defendants herein, wherein it was set forth that defendants had agreed with plaintiff to take all the green asparagus raised by plaintiff prior to April 5, 1934, but that defendants failed and refused to furnish a satisfactory guaranty and that by reason of said refusal plaintiff sold said asparagus in the open market and suffered damages in the sum of $18,000.00, in that said defendants' Exhibit "C" for identification disclosed that plaintiff and defendants had not entered into the written contract set forth in plaintiff's complaint, and said letter tended to impeach the testimony of plaintiff and said Martin J. Dinkelspiel adduced on behalf of plaintiff.

20. That the court erred in denying defendants' motion [197] for a new trial in that the undisputed evidence disclosed that plaintiff and defendants had

never entered into a contract in writing for the sale of the asparagus, and that the undisputed evidence disclosed that all negotiations by and between the plaintiff and defendants with reference to the alleged contract sued upon were abandoned.

21. That the Court erred in denying defendants' motion to strike out the testimony given by the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract, to which an exception was noted, in that plaintiff's cause of action was based solely upon a contract in writing.

22. That the Court erred in denying defendants' motion to strike out plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, to which an exception was noted, for the same reasons that the Court erred in admitting said Exhibit 8 into evidence as more fully appears from Assignment of Error No. 14.

23. That the Court erred in stating in the presence of the jury, to which an exception was noted:

> "The COURT: There is no harm in hearing either one of them state he thought he made a contract or not. In other words, that doesn't pass upon the legality of a contract, but his attitude in connection with the testimony he is giving. I see no objection to that, because it is his personal attitude. I will allow it to stay in the record.

which statement was made after plaintiff and defendants had stipulated that the plaintiff's answer "I did" to the following question might go out of the record:

> Mr. DINKELSPIEL: Q. After the receipt of the wire of February 13, 1934, from Mr. Rothstein, did you believe, as far as you were concerned you were bound under that obligation to deliver your asparagus to Mr. Rothstein on his furnishing you with a satisfactory guarantee? [198]

n that the statement of the Court was tantamount o an instruction to the jury that the fact that the plaintiff thought he had obligated himself was evilence of the existence of a contract.

24. The Court erred in giving the following instruction to the jury, to which exception was noted, n that the uncontradicted evidence discloses that plaintiff and defendants were not to be bound until he proposed agreement was reduced to writing, igned by the parties and approved by the court, nd the court failed to instruct the jury what was neant by "ordinarily":

> Where parties through written correspondence reach a specific and definite agreement, intending that the agreement shall be subsequently expressed formally in a single paper, which shall be the evidence of what has been agreed upon, the obligatory character of the agreement

cannot ordinarily be defeated by the failure of either party to sign the formal contract.

25. The Court erred in giving the following instruction to the jury, to which exception was noted, in that said instruction is contrary to law for the reason that the intention and understanding of the parties according to the Statute of Frauds must be ascertained from the alleged written contract:

> You are instructed that the plaintiff, in support of the allegations of his complaint has introduced in evidence two telegrams, one addressed from the plaintiff to the defendants and the other from the defendants to the plaintiff. For the purpose of explaining the terms used by the parties, evidence has been introduced. The Court instructs you that if you find from the evidence that the plaintiff offered to sell all of the asparagus grown by the Golden State Asparagus Company during the period specified in the telegram sent by the plaintiff, and the defendant by its telegram offered to purchase all bunch asparagus grown by the Golden State Asparagus Company during the time specified in the telegrams, then you are to determine from the evidence if the plaintiff and defendants understood the same thing as to what was being offered for sale and what was agreed to be purchased.

26. The Court erred in giving the following instruction to the jury, to which exception was

noted, in that said instruction is contrary to law for the reason that the intention and [199] understanding of the parties according to the Statute of Frauds must be ascertained from the alleged written contract:

> If you therefore find from the evidence that plaintiff, in sending his wire under date of February 12, 1934, to the defendant, confirmed a verbal understanding or agreement and that the defendant with full knowledge of that prior understanding sent his telegram under date of February 12, 1934, in acknowledgment of plaintiff's telegram, and also confirming said transaction, you will find in favor of the plaintiff.

27. The Court erred in refusing to give the defendants' proposed instruction No. 23, to which refusal an exception was noted, in that the parties must be deemed to have contracted with reference to the custom and usage of the produce trade, said proposed instruction being as follows:

> You are instructed that if you find from the evidence that plaintiff and defendants entered into a contract for the sale of the asparagus described in plaintiff's telegram and that thereafter the defendants offered to post a satisfactory bank guarantee according to trade custom and usage of the produce trade, but that plaintiff refused to accept same, then you are instructed that the defendants did not breach the contract with plaintiff and your verdict must be for defendants.

28. The Court erred in refusing to give the defendants' proposed instruction No. 26, to which an exception was noted, in that the parties must be deemed to have contracted with reference to the custom and usage of the produce trade, said proposed instruction being as follows:

> You are instructed that if you find from the evidence that it is the usage and custom of the produce trade that before a contract for the sale and purchase of asparagus is consummated the parties to the contract must agree as to the grade, size, pack, whether bunched or loose, number of inches in length and diameter and percentage of green color in the asparagus, and if you find that the plaintiff and defendants did not agree as to the grade, size, pack, whether bunched or loose, number of inches in length and diameter and percentage of green color in the asparagus to be sold defendants, then you are instructed that no contract was entered into between plaintiff and defendants, and your verdict must be for defendants. [200]

29. The Court erred in refusing to give the defendants' proposed instruction No. 29, to which refusal an exception was noted, for the reason that the facts in this case disclosed that the proposed contract, "Plaintiff's Exhibit 7", embodied terms additional to the terms contained in the telegrams, "Plaintiff's Exhibits 2 and 3", said proposed instruction being as follows:

You are instructed that if you should find that the terms and conditions sought to be contained in the written contract tendered by plaintiff to defendants embodied terms additional to those agreed upon by plaintiff and defendants and that the minds of the parties did not meet as to the additional terms, then you are instructed that no contract was entered into and your verdict must be for defendants.

30. The Court erred in refusing to give the defendants' proposed instruction No. 30, to which refusal an exception was noted, in that the uncontradicted evidence discloses that plaintiff and defendants were not to be bound until their proposed agreement was reduced to writing and signed by them and approved by the Court, said proposed instruction being as follows:

If you find from the evidence that the plaintiff and the defendants intended that the negotiations had by them for the sale of asparagus pursuant to the telegrams offered in evidence would be reduced to a written contract to be thereafter executed between them and that the plaintiff and defendants failed to agree upon the terms of said written contract, then the Court charges you that no contract was entered into between plaintiff and defendants and your verdict must be for the defendants.

31. The Court erred in refusing to give the defendants' proposed supplemental instruction No. 2, to which refusal an exception was noted, in that

the parties must be deemed to have contracted with reference to the custom and usage of the produce trade, said proposed instruction being as follows:

> You are instructed that if you find from the evidence that in accordance with the use and custom of produce dealers that before a contract for the sale and purchase of asparagus is finally consum- [201] mated the parties to the contract reduced their agreement in writing as to the grade, size, pack, whether bunched or loose, number of inches in length and diameter and percentage of green color in the asparagus contracted for, and if you further find from the evidence that the plaintiff and defendants had agreed that a form of contract would be executed by them so as to describe the grade, size, pack, whether bunched or loose, number of inches in length and diameter and the percentage of green color in the asparagus to be sold defendants, and that said written form of contract was never executed between the plaintiff and defendants, then you are instructed that plaintiff and defendants did not enter into a contract for the sale by plaintiff and the purchase by the defendants of asparagus and your verdict must be for the defendants.

32. The Court erred in refusing to give the defendants' proposed supplemental instruction No. 3, to which refusal an exception was noted, for the reason that the undisputed evidence in this case discloses that the proposed contract was not to be

binding upon plaintiff until the approval of the above entitled court was obtained, said proposed instruction being as follows:

> You are instructed as a matter of law that a contract, in order to be binding, must be equally binding upon both parties to the contract with the same force and effect. Therefore, if you should find from the evidence that the plaintiff intended that any contract proposed to be entered into between plaintiff and defendants would not be binding upon plaintiff, as receiver of the Golden State Asparagus Company, until the approval of this court was obtained, then the court instructs you that the defendants were not bound by said contract until the approval of the court was obtained.

33. That the verdict and judgment are contrary to law in that the two telegrams "Plaintiff's Exhibits 2 and 3", upon which plaintiff based the contract in writing alleged in his complaint, did not constitute a sufficient writing within the meaning of the Statute of Frauds to make a written contract.

34. That the verdict and judgment are contrary to law in that the telegram sent by defendants to plaintiff, "Plaintiff's Exhibit 3", did not constitute an acceptance in writing of plain- [202] tiff's offer, "Plaintiff's Exhibit 2", in that plaintiff offered to sell all shipping asparagus if a satisfactory bank guarantee was given, whereas the defendants

offered to buy all bunched asparagus and to give a satisfactory guarantee.

35. That the verdict and judgment are contrary to law in that the evidence is undisputed that plaintiff and defendants abandoned all negotiations with reference to the proposed contract upon which plaintiff's case is based.

36. That the verdict and judgment are contrary to law in that the evidence is undisputed that plaintiff and defendants were not to be bound until a written contract was prepared and signed by plaintiff and defendants and approved by the above entitled court.

37. That the verdict and judgment are contrary to law in that the evidence is undisputed that the records of plaintiff, "Plaintiff's Exhibit 8", were incompetent to show alleged damages suffered by plaintiff in that it appears without contradiction from the evidence that

(a) The pages offered in evidence were not the original, permanent and regular books of account kept by plaintiff.

(b) The said pages were prepared from figures and data not within the knowledge of plaintiff and were furnished to plaintiff by third persons not in the employ of plaintiff.

(c) The said pages did not constitute a true and correct report and account of moneys received and due to plaintiff from the sale of the asparagus, the subject matter of this action.

WHEREFORE, appellants pray that by reason of the errors aforesaid contained in these Assign-

ments of Error, the judgment and verdict rendered against them be reversed and held for naught and said action finally dismissed.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants
and Appellants. [203]

[Title of Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That the MASSACHUSETTS BONDING AND INSURANCE COMPANY, a body corporate duly incorporated under the laws of the State of Massachusetts and authorized to act as Surety under the Act of Congress approved August 13th, 1894, as amended by the Act of Congress approved March 23, 1910, whose principal office is located in the City of Boston, Massachusetts, and duly authorized to transact business and issue surety bonds in the State of California, as Surety, is held and firmly bound unto GEORGE N. EDWARDS as Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation, in the full and just sum of Two Hundred Fifty and no/100 Dollars ($250.00), lawful money of the United States of America, for which payment well and truly to be made, we bind ourselves, and our heirs, executors, administrators and successors, firmly by these presents.

Signed, sealed and dated this 30th day of December, A. D. 1935.

WHEREAS, lately at a regular term of the District Court of the United States for the Southern Division of the Northern District of California, in a suit pending in said Court between GEORGE N. EDWARDS as Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation, Plaintiff, and HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE and RICHARD ROE, individually and as co-partners doing business under the firm name and style of H. ROTHSTEIN & SONS, a corporation, Defendants, a judgment was rendered against the said Defendants, and the said Defendants having obtained from said Court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, [204]

NOW, THEREFORE, the condition of the above obligation is such, that if the above named Defendants shall prosecute their appeal to effect, and answer all costs which may be awarded against them, as such appellants, if such appeal is not sustained, then this obligation shall be void; otherwise to remain in full force and virtue, and the said Surety agrees that in case of a breach of any condition hereof said Court may, upon notice to it of not less than ten (10) days, proceed summarily in this action to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution thereof, not exceeding, however, the sum

specified in this undertaking.

MASSACHUSETTS BONDING AND INSURANCE COMPANY

[Seal] By J. R. McKINNEY

Attorney in Fact

(Signature of J. R. McKinney acknowledged before Notary Public Dec. 30, 1935.)

Approved: 12/30th/35.

HAROLD LOUDERBACK,
U. S. Dist. Judge.

[Endorsed]: Filed Dec. 1935. [205]

[Endorsed]: Filed Dec. 30, 1935.

[Title of Court and Cause.]

ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS

Upon application of counsel for the defendants in the above entitled action,

IT IS HEREBY ORDERED that in connection with the appeal of the said defendants to the United States Circuit Court of Appeals for the Ninth Circuit Plaintiff's Exhibit No. 8 may be trans- [206] mitted to the said Appellate Court for its inspection.

Dated: December 28th, 1935.

HAROLD LOUDERBACK
United States District Judge [207]

[Endorsed]: Filed Dec. 12, 1936.

Receipt of a copy of the within Amended Praecipe is hereby admitted this 10th day of Dec. 1936.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff

[Title of Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court, in and for the Northern District of California, Southern Division:

Please disregard the Praecipe for Transcript of the Record heretofore filed herein, and prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court [208] of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled cause on the 1st day of November, 1935, and include therein the following:

The Complaint.
Answer of Defendants.
The Judgment.
The Bill of Exceptions as settled.
Defendants' Petition for Appeal.
Order Allowing Appeal.
Assignment of Errors.
Bond on Appeal.
Citation.
Order authorizing original exhibit to be transmitted to Appellate court.
This amended praecipe.

You will also please forward in addition to said transcript the plaintiff's Exhibit No. 8 introduced in evidence in the trial of said cause.

Dated: December 10, 1936.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants. [209]

[Title of Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 209 pages, numbered from 1 to 209, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled George N. Edwards, Etc., Plaintiff, vs. Henry Rothstein, et al, Defendants, No. 19830-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $25.40 and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of December, A. D. 1936.

[Seal] WALTER B. MALING
Clerk.

J. P. WALSH
Deputy Clerk. [210]

United States of America—ss.

The President of the United States to GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company, a corporation, Plaintiff and Appellee,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership, defendants, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said apepllants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback, United States District Judge for the Northern District of California, this 30th day of December, A. D. 1935.

HAROLD LOUDERBACK,
United States District Judge. [211]

Receipt of a copy of the within Citation on Appeal is hereby admitted this ..... day of January, 1936.

DINKELSPIEL & DINKELSPIEL.

[Endorsed]: Filed Jan. 3, 1936.

[Endorsed]: No. 8412. United States Circuit Court of Appeals for the Ninth Circuit. Henry Rothstein, M. H. Rothstein and I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, a copartnership, Appellants, vs. George N. Edwards, as receiver in equity of Golden State Asparagus Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 17, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

6

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

INTRODUCTION.

This action was tried before a jury, which rendered a verdict in the sum of $7504.02 in favor of plaintiff and appellee, a resident of the State of California, and against defendants and appellants, residents of the State of Pennsylvania. From the judgment of the United States District Court for the Northern District of California entered upon the said verdict, appellants have prosecuted this appeal. The complaint alleged that appellants breached an alleged con-

tract in writing (consisting of two telegrams) to purchase all of the bunch asparagus to be grown by appellee during the 1934 season up to and including April 10, 1934, at a price of $2.00 per crate f. o. b. cars Isleton, by refusing to furnish a sufficient bank guarantee, guaranteeing to appellee payment of the purchase price; that the difference between the market or current price for the asparagus available for delivery and the contract price, was the sum of $7074.15, which amount appellee claimed as damages. (Tr. pp. 4-5.) Appellants denied execution of the alleged written contract, and denied that appellee had suffered damages as alleged. (Tr. p. 6.)

JURISDICTION.

District Courts of the United States have original jurisdiction of all suits of a civil nature between citizens of different states where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00.

28 *U. S. C. A.*, Section 41.

The Circuit Courts of Appeals of the United States have appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts in all cases, save where a direct review of the decision may be had in the Supreme Court under Section 345.

28 *U. S. C. A.*, Section 25.

ASSIGNMENT OF ERRORS RELIED UPON.

For the purpose of this appeal, appellants rely upon Assignments of Error Nos. 2, 3 (Tr. p. 212); 4, 5, 6 (Tr. p. 213); 8, 9, 11, 12 (Tr. p. 214); 13, 14 (Tr. p. 215); 15, 16 (Tr. p. 216); 21, 22, 23 (Tr. p. 218); 33, 34 (Tr. p. 225); 37 (Tr. p. 226).

STATEMENT OF FACTS.

George N. Edwards, the plaintiff and appellee, is the receiver in equity of the Golden State Asparagus Company, a corporation, whose principal business is farming. Henry Rothstein, M. H. Rothstein and I. Rothstein, as copartners trading as H. Rothstein & Sons, the defendants and appellants, have been engaged in the wholesale fruit and produce business in Philadelphia for the past 30 years.

In the latter part of January, 1934, M. H. Rothstein and Ben Krasnow, an employee of H. Rothstein & Sons, called on Edwards at his office in Oakland, and arranged an appointment to be held on February 10, 1934, at Isleton, where a part of the farming lands of the receivership estate were located.

Negotiations were had for the purchase of the estate's asparagus by H. Rothstein & Sons. The parties discussed the general details concerning the manner in which shipments were to be made, and it was stated that just bunch asparagus was to be shipped. (Tr. pp. 17, 18.) The specifications of the bunch asparagus were discussed and it was stated that

the asparagus would be similar to that which had theretofore been purchased by H. Rothstein & Sons through Garin, which had complied with the specifications of the State Department of Agriculture. (Tr. p. 35.)

Edwards asked a price of $2.00 a crate f. o. b. cars at Isleton. Rothstein then said that he was going to Seattle and Edwards gave him 48 hours within which to accept or decline the sale at that price. Within 48 hours thereafter, Krasnow telephoned the appellee that H. Rothstein & Sons would accept all asparagus available for shipment between the opening of the season and April 10th at the price quoted. (Tr. p. 18.) Krasnow asked the appellee to wire Mr. M. H. Rothstein at Seattle confirming the sale. Edwards then sent the following telegram:

> "Will confirm sale to H. Rothstein and Son all asparagus shipped from Golden State Asparagus Co. up to and including Apr 10 34 $2 per crate fob cars Isleton providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid wire answer 801 Jones Avenue Oakland
>
> Geo N Edwards Receiver
> Golden State Asp. Co."
>
> (Plaintiff's Exhibit No. 2. Tr. pp. 19-20.)

to which Rothstein wired in reply:

> "Answering will arrange guarantee payments all bunch asparagus price mentioned expect return San Francisco last this week or first next week don't worry when we make deal with you

will go through with same can draw up contract my arrival meantime figuring deal confirmed

M. H. Rothstein."

(Plaintiff's Exhibit No. 3. Tr. p. 21.)

The appellee bases his cause of action on these two telegrams, asserting that they constitute a contract in writing.

Edwards testified that he showed these two telegrams to Messrs. Dinkelspiel & Dinkelspiel, his attorneys as receiver, and instructed them to draw up a contract and submit it to Rothstein for his signature. (Tr. p. 30.) Thereafter, on February 19th, a conference was held in Dinkelspiel & Dinkelspiel's office, at which conference M. H. Rothstein, Krasnow, Edwards and Mr. Martin Dinkelspiel were present. Edwards told Rothstein that the meeting was for the purpose of arranging the bank guarantee. (Tr. pp. 22, 23, 112.) He told Rothstein that he estimated that there would be about 20,000 crates of bunch asparagus available and that he should be given an irrevocable letter of credit for $40,000.00 so that he could draw against appellants' bank as shipments were made or in the alternative that he should be given a $40,000.00 bank guarantee so that he would be assured of payment. (Tr. pp. 113, 133.) Dinkelspiel testified that Rothstein refused to furnish such a guarantee (Tr. pp. 113, 114), and that he then read various clauses from the Garin contract (Defendants' Exhibit No. 5; Tr. p. 86) and that he told Rothstein that the only thing between them was the question of the guar-

antee. (Tr. p. 114.) He asked Rothstein if it would be possible for him to furnish a small letter of credit and some sort of a surety bond. Rothstein said that he would see if he could obtain a $5000.00 surety bond. Dinkelspiel, at Rothstein's request, dictated the following telegram (Defendants' Exhibit No. 1) to Rothstein's home office:

> "Necessary place five thousand dollar faithful performance bond with Edwards receiver Golden State Asparagus Company Stop Notify your surety company have their San Francisco agent write bond and communicate with Martin Dinkelspiel Golden States attorney
>
> M. H. Rothstein."

(Tr. p. 33.)

Dinkelspiel then told Rothstein that he would draft a contract and have it ready when Rothstein returned in the afternoon. At the afternoon conference Dinkelspiel told Rothstein that he had conferred with certain of the creditors of the receivership estate and that they would not approve any transaction with H. Rothstein & Sons on a guarantee or surety bond of $5000.00, and that therefore he had taken the liberty of inserting in the written contract a provision providing for a $5000.00 surety bond and a $5000.00 letter of credit which was to be maintained at all times at $5000.00. Rothstein said that he would not sign any such contract nor give any surety bond. Dinkelspiel then asked Rothstein whether he would put up a $10,000.00 surety bond, stating that if that were done they could probably make a deal. Rothstein replied that he would not put up any surety

bond and that they would have to deal with him on his credit or not at all. (Tr. pp. 121-122.)

Edwards then said that he guessed they could not trade with Rothstein and they shook hands, and Rothstein and Krasnow left the meeting. (Tr. p. 122.)

The asparagus belonging to the receivership estate, which it is alleged that appellants had contracted to buy, was consigned by appellee through one Roper to various dealers and commission men in the east. (Tr. p. 36.) Edwards testified that 15,161 crates of bunch asparagus were shipped and the sum of $22,-547.85 was the net amount received therefor. At $2.00 a crate the receiver would have obtained $30,322. The difference between the amount which he claimed he had received and this sum is the amount claimed as damages. (Tr. pp. 23-24.)

The record, however, discloses that an undetermined sum in excess of $22,547.85 was received by the appellee from the sale of this asparagus. (Tr. p. 161.)

ARGUMENT.

It is the contention of appellants that the two telegrams (Plaintiff's Exhibits Nos. 2 and 3) did not constitute a contract in writing; that there was a fatal variance between the proof and the pleadings; that the motion of the appellants for a directed verdict should have been granted; that there was a failure of proof as to the alleged damages.

I.

THE TWO TELEGRAMS (PLAINTIFF'S EXHIBITS NOS. 2 AND 3) DID NOT CONSTITUTE A CONTRACT IN WRITING.

The following assignments of error charge that the two telegrams (Plaintiff's Exhibits Nos. 2 and 3) did not constitute a contract in writing, and therefore the assignments will be treated as one:

> The court erred in holding that there was any evidence of a contract upon the part of defendants sufficient to go to the jury in that the uncontradicted evidence discloses that plaintiff and defendants had never entered into a contract as alleged in plaintiff's complaint, or at all. (Assignment of Error No. 4, Tr. p. 213.)
>
> That the evidence is insufficient to support the verdict and judgment in that it shows that plaintiff and defendants never entered into a contract for the sale of asparagus and that plaintiff had failed to prove the damages alleged to have been suffered by him. (Assignment of Error No. 6, Tr. p. 213.)
>
> That the verdict and judgment are contrary to law in that the two telegrams "Plaintiff's Exhibits 2 and 3", upon which plaintiff based the contract in writing alleged in his complaint, did not constitute a sufficient writing within the meaning of the statute of frauds to make a written contract. (Assignment of Error No. 33, Tr. p. 225.)
>
> That the verdict and judgment are contrary to law in that the telegram sent by defendants to plaintiff, "Plaintiff's Exhibit 3", did not constitute an acceptance in writing of plaintiff's offer, "Plaintiff's Exhibit 2", in that plaintiff offered to sell all shipping asparagus if a satisfactory bank guarantee was given, whereas the defendants offered to buy all bunched asparagus and to give a satisfactory guarantee. (Assignment of Error No. 34, Tr. pp. 225-226.)

The alleged contract being one for the sale of goods of a value in excess of $500.00, it was governed by Section 1724 of the Civil Code of the State of California, which section reads:

"§1724. Statute of Frauds. (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually receive the same, and give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; * * *".

The Supreme Court of the State of California has defined the requirements necessary to enable a note or memorandum in writing to conform to the requirements of the statute of frauds, in the following terms:

"To satisfy the Statute of Frauds, a memorandum 'must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intentions of the parties.' (5 Browne on Statute of Frauds, Section 371.)"

Seymour v. Oelrichs, 156 Cal. 782.

More definitely stated, the memorandum must show a concluded contract. In *Kling v. Bordner,* 61 N. E. 148, at 150, the Supreme Court of Ohio stated:

> "The memorandum which the statute requires 'to be in writing', is, to use its language, a memorandum of the 'agreement' between the parties; and it is now well settled, as held by Chancellor Kent in Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273, that the memorandum in writing, 'to be valid within the statute of frauds, must not only be signed by the party to be charged, but must contain the essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof.' The rule is not less explicitly stated in Reed, St. Frauds, par. 392, as follows: 'First, the memorandum must show an agreement, that is to say, a concluded contract; secondly, it must be intended as evidence of such contract; and, thirdly, it must show the whole contract. A contract, then, must be shown by the writing, in which the minds of the parties have met. The memorandum must be so reasonably certain and definite in itself that the contract can be made out without requiring additional proof in parol. "It must contain such words as will enable the court, without danger of mistake, to declare the meaning of the parties; it must obviate the necessity of going to oral testimony and relying on treacherous memory as to what the contract itself was." ' "

The requirement that the memorandum disclose a completed contract was recognized by the Supreme

Court of California, in *Breckinridge v. Crocker,* 78 Cal. 529, wherein the court stated:

> "The burden is on plaintiff to show by the writings that a contract, definite and certain in its terms, was entered into between the parties, and failing to do that, he must fail to obtain any relief."

In *Wristen v. Bowles,* 82 Cal. 84, the court stated:

> "It is for the court to determine whether letters which have passed between parties constitute an agreement between them. * * * These letters certainly did not. To constitute a binding contract made in this form, there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. * * * A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. * * * An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. * * * An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. (Civ. Code, Sec. 1585.)"

In *Leach v. Weil,* 114 N. Y. S. 234, the court stated:

> "It does not suffice that the writing evidence a contract. It must embody the terms of the contract actually made."

It is the contention of appellants that the two telegrams (Plaintiff's Exhibits 2 and 3) relied upon by appellee to prove the alleged written contract do not constitute a contract in that:

(1) The writings do not show an absolute and unqualified acceptance by appellants of appellee's offer;

(2) The writings do not show a meeting of the minds as to the subject matter of the alleged contract and the terms thereof;

(3) The provisions of the alleged writings were not mutually binding upon both appellee and appellants;

(4) The writings disclose a counter-offer by appellants which amounted to a rejection of appellee's offer, and which counter-proposal was not accepted by appellee in writing.

The question of whether or not the above telegrams constituted a contract in writing was a question of law for the court to determine.

Code of Civil Procedure, State of California, Section 2102.

"It is for the court to determine whether letters which have passed between parties constitute an agreement between them. (Luckhart v. Ogden, 30 Cal. 547.) These letters certainly did not."

Wristen v. Bowles, 82 Cal. 84.

"The question of law, whether these writings constitute a contract, and, if so, whether they satisfy the provisions of the statute of frauds, survives the unanimous decision of the Appellate Division, and is subject to review by this court."

Pool v. Brunswick-Balke-Collender Co. (Court of Appeals of New York), 110 N. E. 619, 620.

(1) The writings do not show an absolute and unqualified acceptance by appellants of appellee's offer.

Appellee's telegram (Plaintiff's Exhibit No. 2) offered to sell to appellants "all asparagus shipped from Golden State Asparagus Co. up to and including April 10, 1934, $2.00 per crate f. o. b. cars Isleton, providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid." To this offer appellants replied by telegram "answering will arrange guarantee payment all bunch asparagus price mentioned." (Plaintiff's Exhibit No. 3.) It must be conceded that unless the terms "all asparagus" and "all bunch asparagus" have an identical meaning and unless the words "satisfactory bank guarantee" and the words "guarantee payment" have an identical meaning, appellants did not make an unqualified acceptance of the offer of appellee, but instead made a counter-proposal, which amounted to a rejection of appellee's offer.

In order to determine the *meaning of the technical words* used by the parties in the respective telegrams, the trial court properly permitted the introduction of parol testimony to show the meaning these words had in the produce trade.

In *American Sugar Refining Co. v. Colvin Atwell & Co.,* 286 Fed. 685, the District Court of Pennsylvania stated at page 687:

> "Reading into a contract the true meaning of technical terms, familiar to and used by the parties to a contract, is in no sense supplying by parol a missing term of the agreement. Such trade usage or meaning is supposed to have been in the minds

of the parties when the contract was made, and hence the real meaning of the words becomes a part of the contract. When the words 'basis 22.50' are thus explained by the averments of the declaration, it would seem that every grade or package of sugar available for selection is specified. Neither the parol evidence rule nor the statute of frauds is violated by reading into a contract a translation of technical terms used into words of general understanding. This principle is set forth in Franklin Sugar Refining Co. v. Howell, 274 Pa. 190, 118 Atl. 109. * * * the court said:

> 'Every agreement is made and to be construed with due regard to the known characteristics of the business to which it relates, * * * and hence the language used in a contract will be construed according to its purport in the particular business, although this results in an entirely different conclusion from what would have been reached, had the usual meaning been ascribed to those words. * * *.' ''

In connection with the meaning of the words "all bunch asparagus" and "all asparagus", appellee testified that the term "bunch asparagus" is a common term used on the market; that bunch asparagus is asparagus not less than 3/8ths of an inch in diameter, 9 inches long, with 6 to 7 inches of green on the stalk, and with fairly close heads, which is put in bunches with a press and tied with a ribbon; that bunch asparagus did not include crooked or seeded heads or crooked spears or small sizes. (Tr. pp. 18, 19, 40, 41.) Appellee further testified that the shipping of bunch asparagus would involve a less number of crates than if all

of the asparagus was shipped, and that there are other classes of asparagus than bunch asparagus. (Tr. p. 35.)

H. P. Garin, called as a witness by the appellants, testified that for about 30 years he had been engaged in the produce business, farming and shipping vegetables, and was familiar with the custom and usage generally prevailing in the asparagus industry. (Tr. p. 46.) As to the terms used in the telegrams, the witness testified that according to custom and usage in the asparagus trade there is a difference between the terms "all asparagus" and "all bunch asparagus". There is a loose pack of asparagus, and a bunch pack, and six grades of bunch pack, the colossal, jumbo, extra fancy, fancy, select and extra select. (Tr. pp. 48-49.)

Walter S. Markham, called as a witness for the appellants, testified that for about 20 years he had been in the shipping and brokerage business, distributing vegetables. (Tr. p. 50.) Regarding the terms used in the telegrams, the witness testified that the term "bunch asparagus" according to custom and usage in the trade means generally asparagus of sufficient quality to justify bunching, packed in containers with certain sized dimensions, and with minimums as to size. The term "all asparagus" according to custom and usage in the trade means everything produced, culls, crooks, seeded heads, anything that could be cannery asparagus or loose asparagus or bunch asparagus. (Tr. pp. 62-63.)

Appellant, M. H. Rothstein, testified that he was a member of the firm of H. Rothstein & Son. Regarding the terms used in the telegrams he testified that in

accordance with the custom and usage of the trade he understood the term "all asparagus" to mean all the asparagus grown and delivered as the grower saw fit. (Tr. p. 69.)

It is apparent from the foregoing testimony that there is a difference between the meaning of the words "all asparagus" and "all bunch asparagus", in that "all asparagus" means the entire crop of asparagus grown, whereas the term "bunch asparagus" designates a particular portion of the crop that complies with certain specifications. Therefore, appellants' telegram (Plaintiff's Exhibit No. 3) was not an absolute and unqualified acceptance of the offer contained in appellee's telegram. (Plaintiff's Exhibit No. 2.) The telegrams on this ground alone failed to constitute a written contract.

> "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."
>
> *California Civil Code,* Section 1585.

In *Washington Ice Co. v. Webster,* 62 Maine 341, 359, the question before the court was whether or not certain writings constituted a written contract within the meaning of the statute of frauds. The court stated:

> "The case of Carter et al. v. Bingham, 32 Up. Can. R., 615, is in point. It was an action for non-delivery of fifteen bales of hops alleged to have

been sold by defendant to plaintiffs, the evidence showing that in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at twenty cents per pound, and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant, 'will take 15 to 20 bales *good* new hops at 20 cents, cash.' On the 21st, defendant replied by telegram, 'Your offer accepted. Have booked your order for fifteen bales new hops, for delivery when picked.' * * *

Held, I. That there was no binding contract at any time between the parties, for the defendant's answer of the 21st of August, was not a simple acceptance of the plaintiffs' offer of the 17th, *but qualified it both as to quality* (*by leaving out the word good*), and as to time of delivery; and assuming defendants' telegram of the 16th of September to be a renewal of such acceptance, the plaintiffs' subsequent telegram did not show an assent to it. In delivering the opinion of the court, Morrison, J., says: 'The rule of law I take to be, that an acceptance of a proposition must be a simple and direct affirmation, in order to constitute a contract, and if the party to whom the offer or proposition is made, accepts it adding any condition, with any change of its terms or provisions, which is not altogether immaterial, it is no contract until the party making the offer, consents to the modifications; that there can be no contract which the law will enforce until the parties have agreed upon the same thing in the same sense.' The agreement must be entire—as to the thing sold, its price, the time of delivery, and the terms of payment. In the present case, no such agree-

ment is shown. To the same effect are the cases of Sievewright v. Archibald, 17 Q. B. 103; Gether v. Capper, 14 Q. B. 39; Hamilton v. Terry, 11 C. B. 954." (Italics ours.)

It is apparent from the above case, which is analogous to the case at bar, that appellants' telegram was not an unqualified acceptance of the offer contained in appellee's telegram.

As the words "satisfactory bank guarantee" and "will arrange guarantee" on their face appear to be contrary terms, the burden was upon appellee to show that the terms had identical meanings. (See *Breckinridge v. Crocker,* 78 Cal. 529, supra.) Nowhere in the record is there one iota of testimony that the words have the same meaning, and it is apparent that nowhere in appellants' telegram (Plaintiff's Exhibit No. 3) did appellants agree to provide a satisfactory *bank* guarantee. Upon this ground alone there could be no acceptance of appellee's offer.

(2) The writings do not show a meeting of the minds as to the subject matter of the alleged contract and the terms thereof.

If, for the purpose of argument, it is conceded that appellants agreed to provide a satisfactory bank guarantee as requested by appellee, appellants ask this question: Where, in either appellee's or appellants' telegram, does it appear how much in dollars and cents would constitute a satisfactory bank guarantee? Or, where in either telegram does it appear how much asparagus would be shipped, from which the monetary amount necessary to provide a satisfactory bank guar-

antee could be ascertained without recourse to parol testimony?

It is evident that neither the appellee, the appellants, any expert witness, nor the court, could tell from an examination of the telegrams the monetary amount appellants would have had to provide in order to comply with the provisions of appellee's offer as to the satisfactory bank guarantee. It is therefore impossible to determine in what particulars appellants breached the alleged contract. The complaint alleges that appellants breached the contract by failing to provide a satisfactory bank guarantee. (Tr. p. 4.) The statute of frauds requires that all of the material elements of the contract be contained in the writings. The very gravamen of appellee's alleged cause of action is unascertainable from the writings relied upon, namely, the amount of the satisfactory bank guarantee appellants failed to provide. The telegrams (Plaintiff's Exhibits 2 and 3) therefore upon this ground failed to constitute a contract.

In *Winburgh v. Gay,* 27 Cal. App. 603, the memorandum upon which plaintiff sought to predicate a cause of action read as follows:

> "Mr. Winburgh:
>
> I will lease to you the stores now occupied by the Union Title & Trust Co. for five years, beginning Jan. 1, 1911. $250 for the first two years and $275.00 for the following three years. Usual clauses in lease to rebuilding.
>
> John H. Gay."

The court affirmed the decision of the lower court that the complaint failed to state a cause of action and held that the phrase "usual clauses in lease to rebuilding" was uncertain, and that the memorandum signed by the defendant was too uncertain to form a basis for that meeting of the minds or mutual assent which is necessary to constitute a contract. The court further held that the terms of the proposed agreement were not stated in writing with sufficient certainty to satisfy the requirements of the statute of frauds.

The term "satisfactory bank guarantee" is likewise too uncertain to form a basis for that meeting of the minds which is necessary to constitute a contract.

In *Vitro Mfg. Co. v. Standard Chemical Co.* (Sup. Ct. Penn.), 139 Atl. 615, the court held:

> "A contract must arise from the acceptance of the last stated terms, and the acceptance must be identical, in order to bring the minds of the parties together."

The testimony of Martin J. Dinkelspiel, one of appellee's attorneys, discloses that it was necessary for the parties to confer *after* the telegrams had been sent in order to fix the amount that would constitute a satisfactory bank guarantee. Mr. Dinkelspiel testified that at the conference in his office on February 19, 1934, Edwards told Rothstein the meeting was for the purpose of getting the bank guarantee fixed up; that Edwards also told Rothstein that he estimated that he would have 20,000 crates of "bunch pack" asparagus and that on such an estimate he ought to have an

irrevocable letter of credit for $40,000.00 so that as shipments were made he could draw against appellants' bank. (Tr. pp. 112-113.)

In *Baird Investment Co. v. Harris* (C. C. A. 8th Cir.), 209 F. 291, the court stated:

> "An agreement within the statute [Statute of Frauds] will not be enforced in equity nor at law if it appears from the face of the agreement that any of the terms, no matter how unimportant they may seem to be, are left open to be settled by future conferences between the parties thereto. In such cases, there is no complete agreement."

That the court erred in admitting into evidence over defendants' objection and exception Plaintiff's Exhibit No. 3, consisting of a telegram sent by defendants to plaintiff, stating that defendants will arrange to guarantee payment for all bunch asparagus at the price mentioned and that plaintiff could draw up a contract between them in that said telegram did not constitute an acceptance of plaintiff's offer to sell asparagus to defendants. (Assignment of Error No. 13, Tr. p. 215.)

From the foregoing authorities it is apparent that as appellants' telegram (Plaintiff's Exhibit No. 3) was not an unqualified acceptance of the offer contained in appellee's telegram (Plaintiff's Exhibit No. 2), and as the two telegrams did not show a meeting of the minds, the trial court erred in admitting appellants' telegram (Plaintiff's Exhibit No. 3) in evidence over the objection and exception of appellants. (Tr. p. 20.)

That the court erred in admitting into evidence over the defendants' objection and exception testimony of the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract except as to the price at which the asparagus was to be sold, in that plaintiff's cause of action was based solely upon a contract in writing. (Assignment of Error No. 12, Tr. p. 215.)

That the court erred in denying defendants' motion to strike out the testimony given by the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract, to which an exception was noted, in that plaintiff's cause of action was based solely upon a contract in writing. (Assignments of Error No. 21, Tr. p. 218.)

Over the objection and exception of the appellants (Tr. p. 26) the trial court permitted appellee to testify to conversations had *prior* to and *after* the execution of the writings, to show in what sense the parties understood the words used in their respective telegrams, and to show what was meant by the words "satisfactory bank guarantee".

The testimony of appellee Edwards pertaining to conversations had with appellant M. H. Rothstein *prior* to the sending of the telegrams with reference to the type of asparagus being negotiated for, was as follows:

> "Mr. Dinkelspiel. Q. Mr. Edwards, directing your attention to the conversation testified to this morning at Isleton at that time between yourself and Mr. Rothstein, Mr. Krasnow being present, about the 10th of February, 1934, was anything said by you or Mr. Rothstein or both of you as to the type or kind of asparagus that was to be the subject matter of this sale?
>
> The Witness. He told Rothstein that he would ship the same quality of asparagus that was shipped to Rothstein through H. P. Garin & Co. in 1931 and 2. Rothstein said that was the quality they wanted; that the kind of asparagus shipped through Garin was bunched asparagus,—shipping—so far as he knew, and no other type of asparagus was shipped to the eastern market.

Rothstein said it was to be shipped to the eastern market—Atlantic Seaboard."

(Tr. pp. 25-26.)

The trial court denied the motion of appellants made at the conclusion of appellee's case to strike out all of the testimony of appellee in regard to the two telegrams (Plaintiff's Exhibits 2 and 3), which motion was made upon the ground that the telegrams contained all the writings passing between the parties. (Tr. p. 45.) The trial court also denied the motion of appellants made at the conclusion of the trial to strike the testimony of appellee upon the ground that said testimony related to a negotiation pertaining to a contract required by the statute of frauds to be put in writing, and that the evidence was irrelevant, incompetent and immaterial to prove the issues as presented by plaintiff's complaint. (Tr. pp. 172-173.) The court also permitted appellee to testify as to what he *intended* by using the words "all asparagus" in his telegram (Plaintiff's Exhibit No. 2), which testimony was permitted to remain in the record by the trial court. He testified that when he used the words "all asparagus" in his telegram (Plaintiff's Exhibit No. 2) he *meant* all shipping asparagus, and that shipping asparagus and bunch asparagus are practically the same thing as far as the trade is concerned; that at Isleton he discussed with Rothstein the specifications of the bunch asparagus, they were to be the same as the asparagus that had been shipped him through Garin, which had passed the State Department of Agriculture specifications. (Tr. p. 35.)

Appellee further testified that he used "all asparagus" in the offer in his telegram (Plaintiff's Exhibit No. 2) because at the time he previously sold asparagus to Garin and Rothstein, they bought the asparagus delivered to their packing shed at a certain price per pound and they packed it out themselves and did the bunching and grading themselves. In discussing the present transaction at Isleton it was understood Rothstein was going to do the bunching and packing himself and it would be the same quality shipped Rothstein before under the Garin contract. In asking Dinkelspiel to draw up a contract he told him that was the understanding with Rothstein and that was to be inserted in the contract Rothstein was to sign. (Tr. pp. 42-43.)

The trial court likewise permitted the following testimony by appellee as to what appellee told Rothstein he would have to give as a satisfactory bank guarantee, which conversation was had *prior* to the sending of the telegrams. Appellee testified that at the conversation at Isleton he told Mr. Rothstein that if he sold him the asparagus they would have to give a satisfactory bank guarantee to assure payment would be made for all of the asparagus that was shipped upon delivery of the documents to them or their representative, which Rothstein said would be done. (Tr. p. 18.) Appellee further testified that at the conference in Dinkelspiel's office he told Rothstein that the only way he knew of to guarantee these payments was to furnish a letter of credit on a reputable bank in the east guaranteeing his bank that the documents would be honored

upon presentation. At the time he had the conversation with Rothstein at *Isleton* he told him definitely in substance the same thing. (Tr. p. 32.)

The trial court also permitted to remain in the record the testimony of appellee as to what he told Rothstein, in Dinkelspiel's office, *after* the telegrams had been sent, as to what his requirements of a satisfactory bank guarantee were. Appellee testified that in the morning conference he told Rothstein that to conform with his requirements of a satisfactory bank guarantee he wanted the bank to guarantee that drafts up to the amount of $40,000.00 would be paid as the goods were shipped and documents delivered to Mr. Rothstein's representative. (Tr. p. 34.)

That the court erred in permitting plaintiff to testify over the objection and exception of defendants that he believed he was obligated to deliver the asparagus to defendants on defendants furnishing him with a satisfactory guarantee, in that the plaintiff's belief as to his rights was immaterial to the determination of the existence of a contract and that the admission of such testimony permitted the jury to believe that plaintiff's belief was evidence of the existence of a contract. (Assignment of Error No. 16, Tr. p. 216.)

That the court erred in stating in the presence of the jury, to which an exception was noted: "The Court. There is no harm in hearing either one of them state he thought he made a contract or not. In other words, that doesn't pass upon the legality of a contract, but his attitude in connection with the testimony he is giving. I see no objection to that, because it is his personal attitude. I will allow it to stay in the record", which statement was made after plaintiff and defendants had stipulated that the plaintiff's answer "I did" to the following question might go out of the record: "Mr. Dinkelspiel. Q. After the receipt of the wire of February 13, 1934, from Mr. Rothstein, did you believe, as far as you were concerned you were bound under that obligation to deliver your asparagus to Mr. Rothstein on his furnishing you

with a satisfactory guarantee?'' In that the statement of the court was tantamount to an instruction to the jury that the fact that the plaintiff thought he had obligated himself was evidence of the existence of a contract. (Assignment of Error No. 23, Tr. pp. 218-219.)

A glaring example of the error committed by the trial court in permitting the introduction of parol testimony is shown by the fact that the court permitted the appellee over the objection of appellants to testify that he believed that he was bound by reason of the telegrams received from Mr. Rothstein (Plaintiff's Exhibit No. 3) to deliver his asparagus to appellants on their furnishing appellee with a satisfactory guarantee. (Tr. p. 22.)

In other words, the trial court permitted appellee to testify as to his opinion and conclusion as to the effect of the two telegrams (Plaintiff's Exhibits 2 and 3) after his attorney had stipulated the answer could go out. The statement by the court in the presence of the jury that such testimony was admissible was clearly prejudicial to appellants for the reason that it was tantamount to an instruction to the jury that the fact that appellee thought he had obligated himself was evidence of the existence of a contract.

The trial court erred in admitting all of the parol testimony heretofore set forth and denying appellants' motion to strike the same. Although it is proper to permit parol testimony to *show* the meaning of words used in writings (*American Sugar Refining Co. v. Colvin-Atwell Co.,* 286 Fed. 685, supra), parol testimony is not admissible to show in what *sense* the parties to written instruments used certain words.

In *Wright v. Weeks,* 25 N. Y. 153, 160, plaintiff sued upon an alleged contract in writing. After the close of the testimony the court granted a motion to strike certain parol testimony, and held that the writing was not sufficient to comply with the statute of frauds. In a concurring opinion, Judge Allen stated:

> "The statute was passed to prevent fraud and perjury, in the establishment of fictitious or misrepresented contracts; and its object can only be effected by requiring not only the fact that such contract was made to be evidenced by writing, but that the contract itself, the entire agreement with all its terms and conditions, shall be in writing. * * * If the agreement be vague and indefinite, so that the full intention of the parties cannot be collected from it, it cannot be said that the contract is in writing, and it is therefore void. *If the parties have used abbreviations or technical terms, or terms of trade, evidence may be given, by parol, to show what meaning such abbreviations and terms had acquired, by usage and custom, but not in what sense the parties used them.*" (Italics ours.)

The Supreme Court of California has also held that parol evidence is not admissible to show in what sense the parties to written instruments used certain words.

> "To satisfy the statute of frauds a memorandum 'must contain the essential terms of the contract expressed with such degree of certainty that it may be understood without recourse to parol evidence to show the *intention of the parties.*' (5 Browne on Statute of Frauds, Sec. 371.)" (Italics ours.)
>
> *Seymour v. Oelrichs,* 156 Cal. 782, 787.

That the parol testimony of appellee as to what asparagus was to be shipped, and the monetary amount necessary to constitute a satisfactory bank guarantee was not admissible is shown by the case of *Hamby v. Truitt* (Ga.), 81 S. E. 593, wherein plaintiff commenced an action against defendant for an alleged breach of a written contract to purchase one hundred bales of cotton. Plaintiff thereafter sought to amend the complaint to set forth that the weight of said bales was to be 500 pounds each, and that it was agreed that the class of the cotton was to be middling. Neither of these provisions appeared in the written contract. The court refused the amendment and an appeal was taken. The court on appeal affirmed the decision and stated:

> "We think the court was undoubtedly right in disallowing the amendments, since the effect of the agreement alleged therein would have been to extend the written agreement by the addition of a parol agreement as to the weight of the bales of cotton and the quality or grade of the cotton to be supplied * * *."

The court pointed out that there was a difference between an amendment seeking to set forth an oral agreement made at the time the written contract was entered into and an amendment to show that the word "bale" meant in the trade 500 pounds of middling cotton, in which case there would be no attempt to vary the terms of the written contract, but would merely supply the actual trade meaning of the term or terms already in the contract.

To the same effect see *Stuart v. Cook* (Ga.), 45 S. E. 398, wherein the court stated:

> "Where some of the terms are in writing, and others in parol, the requirements of the statute are not met * * *."

The error of the trial court in permitting testimony by appellee that he had prior to the sending of the telegrams discussed with appellant, M. H. Rothstein, the fact that the grade of asparagus to be shipped to appellants was to be the same as that contained in the contract previously entered into with Mr. Garin (Defendants' Exhibit No. 5, Tr. p. 35) is shown by the case of *Turner v. P. Lorillard Co.* (Ga.), 28 S. E. 383, 384, wherein the alleged contract left the price blank. Plaintiff sought to introduce evidence to show the parties had dealt together for years and always sold at a stated price, subject to the discounts which were stated in the writing. Bills for other goods ordered by plaintiff from defendant were introduced in evidence, and parol evidence was offered to show the dealings between these parties, in order to complete the writings, and thereby complete the contract of sale. The court held that the contract was incomplete and that the price could not be supplied by parol evidence, and granted a nonsuit. On appeal the court in affirming the decision stated:

> "It is not necessary that the writing provided for in the section quoted shall contain in itself all of the requirements which the statute embraces. * * * If the writing, therefore, refer to any other writing, which can be identified completely by this

> reference, without the aid of parol evidence, then the two or more writings may constitute a compliance with the statute. If, however, two writings are relied upon to satisfy the statute, and parol evidence is necessary to connect them with each other, then they would fail as a compliance with the statute."

To the same effect see *Western Metals Co. v. Hartman Ingot Metal* Co. (Ill.), 135 N. E. 744, 746, wherein the court held:

> "Oral evidence is inadmissible to connect the several papers or show that they relate to the same transaction. Oral evidence can only bring together the different writings. It cannot connect them. They must show their connection by their own contents. The connection must be apparent from a comparison of the writing themselves."

The Supreme Court of California has stated the purpose of the statute of frauds in the following words:

> " 'The Statute of Frauds was originally enacted "for the prevention of frauds and perjuries" and an agreement * * * is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.' "
>
> *Seymour v. Oelrichs,* 156 Cal. 782.

The trial court also erroneously permitted appellee to give his opinion and conclusion as to whether or not he believed the entire contract between himself and

appellants was embodied in the two telegrams. (Plaintiff's Exhibits 2 and 3.) Appellee was allowed to testify that he considered that a sale had been made and that he considered that the two telegrams constituted an agreement. (Tr. p. 31.)

Furthermore, appellee testified that when he gave the telegrams to Dinkelspiel to draw up the contract, he told Dinkelspiel that he had sold the asparagus to Rothstein *in accordance with the arrangement made at Isleton,* and he simply wanted a memorandum of the agreement whereby payment would be guaranteed. (Tr. pp. 31-32.) This testimony showed that appellee was not relying upon the two telegrams (Plaintiff's Exhibits 2 and 3) to constitute the contract sought to be enforced against appellants, but that appellee was attempting to enforce an alleged oral contract agreed upon at *Isleton* prior to the transmission of the telegrams.

In *Jones v. Carver,* 59 Texas 293, the court stated:

> "In other words, it is claimed that, although the parties have never made a contract in such a manner as the law can recognize and the courts will enforce, yet that they, through parol evidence, should be permitted to establish such a contract as they ought to have made in writing, and that the courts ought to enforce it. This a court of equity does not do."

(3) The provisions of the alleged writings were not mutually binding upon both appellee and appellants.

This brings us to another fatal defect in the writings alleged by appellee to constitute a written contract.

Appellee's offer as heretofore stated was to sell all asparagus *shipped* by appellee. (Plaintiff's Exhibit No. 2.) If appellants' reply telegram (Plaintiff's Exhibit No. 3) be construed as an acceptance thereof, appellants agreed to purchase all asparagus *shipped.* It is a well settled principle of law that in order for writings to constitute a contract, they must be mutually binding upon both parties. Appellants ask this question: How much asparagus was appellee bound to *ship* during the time specified? Clearly from the wording of appellee's telegram (Plaintiff's Exhibit No. 2), appellee could have sold his asparagus on the local market and have declined to ship any asparagus to appellants. Appellants could not have sought specific performance, nor could they have alleged any breach on the part of appellee by failure to ship. A case similar to the facts presented herein, is that of *Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co.* (C. C. Mo.), 166 F. 191, wherein an action was commenced to recover damages for breach of a contract to purchase all ties that plaintiff could produce and *ship* to defendant until January 1, 1908. Plaintiff had agreed to sell defendant all ties it could produce and ship within that time. The court in sustaining a demurrer to the complaint stated that the contract was void for want of mutuality in that plaintiff did not assume any obligation legally enforceable against it. The court pointed out that plaintiff did not agree to ship any specified number of ties, that if an action had been commenced against plaintiff to enforce the contract plaintiff could have answered that it could not

produce any ties or that it could not procure cars to ship the ties, which answer would be a complete defense to the action.

To the same effect see *Ellis v. Denver L. & G. R. Co.* (Colo.), 43 Pac. 457.

(4) The writings disclose a counter-offer by appellants which amounted to a rejection of appellee's offer, and which counter-proposal was not accepted by appellee in writing.

Appellants' telegram (Plaintiff's Exhibit No. 3) was a counter-proposal to the offer contained in appellee's telegram (Plaintiff's Exhibit No. 3), in that although appellee's offer was to sell "all asparagus" appellants offered to buy "all bunch asparagus"; furthermore, whereas appellee requested a "satisfactory *bank* guarantee", appellants only agreed to arrange a "satisfactory guarantee".

> "A qualified acceptance is a new proposal."
> *Civil Code of California,* Sec. 1585;
> *Colton v. O'Brien,* 217 Cal. 551, 553;
> *Greenwich Bank v. Oppenheim,* 118 N. Y. S. 297, 299.

> "It seems to us self-evident that, if parties agree to deal on the basis of a rejected offer, the vendor's assent thereto, being an essential part of the contract, *must be in writing.*" (Italics ours.)
> *Lewis v. Johnson* (Minn.), 143 N. W. 1127.

Defendants' telegram (Plaintiff's Exhibit No. 3) was therefore a rejection of plaintiff's offer, and the counter-proposal contained therein could only be accepted by plaintiff in writing. This was never done.

II.

FATAL VARIANCE BETWEEN PROOF AND PLEADINGS.

The court erred in holding that there was any evidence of a contract upon the part of defendants sufficient to go to the jury in that the uncontradicted evidence discloses that plaintiff and defendants had never entered into a contract as alleged in plaintiff's complaint, or at all. (Assignment of Error No. 4, Tr. p. 213.)

A further objection and exception to the introduction of the telegram from the appellants to appellee (Plaintiff's Exhibit No. 3) was made upon the ground that the telegram did not conform to the allegations set forth in the complaint. (Tr. p. 20.) The complaint charged appellants with having breached a contract in writing "to buy all of the bunch asparagus to be thereafter *grown* by plaintiff during the 1934 season, and up to and including April 10, 1934." (Tr. p. 3.) The telegram from appellee to appellants (Plaintiff's Exhibit No. 2) offered to "confirm sale to H. Rothstein & Son of asparagus *shipped* from Golden State Asparagus Co. up to and including April 10, 1934." (Tr. p. 19.) Appellants offered to purchase all bunch asparagus *shipped* (Plaintiff's Exhibit No. 3; Tr. p. 21) therefore, even if it was conceded that appellants' telegram (Plaintiff's Exhibit No. 3) constituted an acceptance of appellee's offer, the telegram did not show the formation of any contract alleged in the complaint, namely, to purchase asparagus *grown* by plaintiff. Appellants, if they accepted any offer, accepted an offer to purchase asparagus *shipped*. There was therefore a failure of proof on the part of appellee to sup-

port the allegations of his complaint. A party cannot set up one cause of action and succeed upon proof of another cause of action, and, unless cured by amendment, a material variance between the pleadings and the proof is fatal.

49 *Corpus Juris* 804, Section 1187.

That this was not a minor variance is best illustrated by the fact that had appellee used the word "shipped" in his complaint instead of the word "grown" defendants could have demurred on the ground that the complaint did not state a cause of action and would have been spared the expense of a trial.

Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co., 166 Fed. 191, supra;

Ellis v. Denver L. & G. R. Co., 43 Pac. 457, supra.

In conclusion, appellants present this question: Can the following facts be ascertained from the face of the two telegrams (Plaintiff's Exhibits 2 and 3) alleged by appellee to constitute a written contract:

(1) How much asparagus appellee was bound to ship?

(2) Whether appellee and appellants were dealing with all of the asparagus belonging to appellee or just the bunch asparagus?

(3) Whether the appellants agreed to provide a satisfactory *bank* guarantee?

(4) What monetary amount constituted a satisfactory bank guarantee?

(5) Whether the telegrams referred to the contract, alleged in the complaint, namely, to purchase all asparagus *grown* by the Receiver?

(6) Whether appellants were bound to take asparagus not grown by appellee but purchased by appellee from other growers, if *shipped* to appellants?

III.

THE MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

The court erred in denying defendants' motion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that the uncontradicted evidence offered by plaintiff and defendants disclosed that plaintiff and defendants had never entered into a contract for the sale of asparagus and that all negotiations had between plaintiff and defendants were preliminary to the execution of a written contract which was never executed and which negotiations were mutually abandoned. (Assignment of Error No. 2, Tr. p. 212.)

After appellee rested, appellants moved the trial court for a directed verdict upon the ground that it appeared that appellee had not proved the allegations in his complaint to the effect that appellants and appellee entered into a contract; that the evidence solely disclosed that the parties merely had some preliminary negotiations. (Tr. p. 45.) At the conclusion of the trial, appellants moved the trial court for an order directing the jury to return a verdict in favor of appellants (Tr. pp. 173, 174, 175), which motion included,

among others, the following grounds: That the evidence showed:

> First. No contract in writing between the parties as alleged in the complaint.
>
> Second. The parties merely negotiated for the sale of appellee's asparagus.
>
> Third. The parties failed to negotiate a satisfactory arrangement as to the manner of payment.
>
> Seventh. The telegrams (Plaintiff's Exhibits Nos. 2 and 3) did not contain all essential elements of a contract as they did not contain a mutual agreement as to the kind of asparagus to be sold and a mutual agreement as to the method of payment for the asparagus if sold. (Tr. pp. 173, 174, 175.)

As the question of whether or not the two telegrams (Plaintiff's Exhibits Nos. 2 and 3) constituted a written contract was a question of law for the trial court to determine (see authorities cited at page 12), and as the argument hereinabove set forth conclusively shows that the two telegrams did not constitute a contract in writing, it follows that the trial court erred in denying the motions of appellants made when appellee rested his case, and at the conclusion of the trial at which time an exception was noted. (Tr. p. 176.)

To illustrate that throughout the entire trial the trial judge was laboring under a misapprehension as to the law applicable to the facts presented to him, the attention of this honorable court is directed to the instruc-

tion given by the court to the jury that if they believed that appellee in sending his telegram (Plaintiff's Exhibit No. 2) *confirmed a verbal understanding* and that the appellants sent their telegram (Plaintiff's Exhibit No. 3) in acknowledgment of appellee's telegram and confirming the transaction, then the jury must find for appellee. (Tr. p. 183.)

The above instruction (Tr. p. 183) was clearly erroneous in that it instructed the jury in effect that irrespective of the contents of the two telegrams (Plaintiff's Exhibits 2 and 3), upon which appellee predicated his alleged cause of action, appellee and appellants had entered into a contract in writing, if the jury found that the parties by sending the telegrams *intended to confirm a prior verbal understanding.* The instruction was contrary to all of the authorities heretofore cited and the error of the court is best evidenced by the case of *Wright v. Weeks,* 25 N. Y. 153 (supra), wherein Chief Justice Denio stated:

> "* * * If a reference in writing to a verbal agreement would let in that agreement, where the subject was one which the statute required to be in writing, it would be sufficient for parties desiring to avoid the trouble of reducing their bargains to writing, to sign a statement that they had contracted verbally respecting a given subject, and they would thus dispense with the statute."

IV.

FAILURE OF PROOF OF ALLEGED DAMAGES.

The court erred in holding that there was sufficient evidence of damages suffered by the plaintiff to go to the jury in that the record discloses that plaintiff failed to prove the alleged damages suffered by him. (Assignment of Error No. 5, Tr. p. 213.)

Appellants contend that appellee failed to prove the damages allegedly suffered as a result of the alleged breach of contract, in that:

(1) Appellee failed to prove the total moneys received or to be received by him from the sale of the asparagus.

(2) Appellee failed to prove the market or current price of asparagus at the time or times when he claims appellants should have accepted delivery thereof.

There is no evidence that plaintiff suffered damages in the sum of seven thousand five hundred four and 02/100 dollars ($7,504.02), the verdict of the jury and the judgment entered herein, in that the undisputed evidence showed that plaintiff's records, "Plaintiff's Exhibit 8", upon which plaintiff relied to show damages, did not contain a true statement of all moneys collected and due plaintiff from the sale of the asparagus, the subject matter of this action. (Assignment of Error No. 8, Tr. p. 214.)

That the verdict and judgment are contrary to law in that the evidence is undisputed that the records of plaintiff, "Plaintiff's Exhibit 8", were incompetent to show alleged damages suffered by plaintiff in that it appears without contradiction from the evidence that:

(a) The pages offered in evidence were not the original, permanent and regular books of account kept by plaintiff.

(b) The said pages were prepared from figures and data not within the knowledge of plaintiff and were furnished to plaintiff by third persons not in the employ of plaintiff.

(c) The said pages did not constitute a true and correct report and account of moneys received and due to plaintiff from the sale of the asparagus, the subject matter of this action. (Assignment of Error No. 37, Tr. p. 226.)

In an attempt to prove the alleged damages suffered, appellee introduced in evidence over the objection and exception of the appellants (Tr. p. 141) 16 yellow pages bound together with string, with penciled entries thereon. (Plaintiff's Exhibit No. 8, Tr. p. 142.)

It is the contention of the appellants that the trial court erred in admitting these pages in evidence and that the trial court erred in denying the motion of appellants to strike the same from the record (Tr. p. 161), as no foundation was laid for the introduction of the pages in that:

(1) The pages did not show the total amount received by appellee from the sale of the asparagus, and were not appellee's permanent records of moneys received from the sale of the asparagus.

(2) The pages did not show the price for which the asparagus was sold, nor the grade of the bunch asparagus sold, and therefore it could not be ascertained therefrom whether the asparagus was sold at the market or current price.

Appellee testified that as a result of the failure of appellants to take the asparagus, he consigned the asparagus to one Roper, who shipped the asparagus to various agents in the east; that when an agent sold

the asparagus, the agent made up an *account sales,* which contained the same car number that Roper gave appellee when the shipment was made, and also showed the number of crates and the grade sold and the price; that the agent deducted the freight, the commissions, and any charges that the agent pays out on the other end, and sent appellee a check for the balance, together with the account sales showing what each grade was sold for. (Tr. p. 135.) The check received by appellee was for the *net* result arrived at by taking the gross sales, and deducting the charges which consisted of freight, precooling, commissions, and sometimes cartage. (Tr. p. 136.)

According to the yellow bound pages (Plaintiff's Exhibit No. 8) during the season of 1934, up to April 10th, appellee shipped 15,161 crates of bunch asparagus. The total price received f. o. b. Isleton was $22,547.85. (Tr. pp. 155-156.) If the asparagus had been sold at $2.00 a crate, $30,322.00 would have been received. The difference between $22,547.85 and $30,-322.00 is the amount claimed as damages suffered. (Tr. p. 24.)

In connection with the bound pages referred to above (Plaintiff's Exhibit No. 8) and the entries thereon, appellee testified that when the asparagus was shipped by Roper, Roper notified him each day that it was shipped and to whom, and appellee made a record of it as he received the notices from Roper. When the selling agent sold the asparagus and rendered appellee an *account of sales* showing the amount of money received for each individual shipment, he

recorded it (Tr. pp. 134-135), that the records (Plaintiff's Exhibit No. 8) are in the appellee's handwriting and are his permanent records. The entries were made at the time the asparagus was shipped and at the time appellee received payment, being made right along from day to day. The bound pages are regularly kept records.

In other words, although appellee in his complaint alleged that the market or current price of his asparagus at the time appellants should have accepted the same was $22,547.85, that sum in fact represented the money received by appellee for his asparagus from agents in the east after they had deducted various charges against same. These agents obtained the asparagus from Roper through whom appellee had consigned the same. The $22,547.85, therefore, did not represent the amount for which the asparagus was *sold* on the market. As will be hereafter shown, appellee admitted that the $22,547.85 was not even the entire amount of money received by him for the asparagus. Furthermore, no attempt was made by appellee to prove the amount for which the asparagus was sold on the market.

(1) Appellee's Exhibit No. 8 did not show all the money received from the sale of the asparagus and was not a permanent record of moneys received.

As heretofore stated, appellee in order to prove the damages allegedly suffered relied upon the figures contained in the bound pages. (Plaintiff's Exhibit No. 8.) From these pages, appellee testified that the

total amount received by him was the sum of $22,547.85. (Tr. pp. 155, 156.)

Appellee admitted upon cross-examination that he was familiar with the fact that claims were filed against the railroad with reference to asparagus shipped, that the claims were filed by the forwarder, that he received from Roper an accounting of the money received from the railroad company on the claims filed. Edwards testified that the bound pages (Plaintiff's Exhibit No. 8) *did not show all of the money which he received* from the sale, disposition or consignment of the asparagus. (Tr. p. 161.) Appellee further testified that in addition to the moneys set out in these bound pages there may have been $40.00 or $50.00, the exact amount he did not recall, representing collections on claims against the railroads. The receipts from the railroad claims were not entered on the pages as they were received probably a year thereafter. He further testified that he could not tell the amount received from the railroads without consulting other records which he did not have in court; that he could only make a guess as to the amount involved in the railroad claims; that his guess was based on what he had recovered in past years from claims against railroads and that to the best of his recollection the annual collection from railroad claims would not exceed $100.00. (Tr. pp. 161-162.)

The testimony above set forth shows without equivocation that appellee had received money from railroad claims in connection with the disposal of the 1934 asparagus crop, which money was not reflected

in the bound pages. (Plaintiff's Exhibit No. 8.) There was therefore a failure of proof as to the alleged damages suffered.

> That it appears from the face of the record that the verdict resulted from conjecture and chance in that there was no competent evidence introduced from which the jury could have found damages in the amount rendered in its verdict. (Assignment of Error No. 11, Tr. p. 214.)

That the testimony given by appellee over the objection and exception of appellants (Tr. p. 166) that the annual recovery from railroad claims would not exceed $100.00 was prejudicial to appellants, is shown by the fact that the jury in rendering its verdict relied upon the same and gave appellee judgment for the entire amount prayed for, less $100.00. (Based upon the above testimony, appellee consented that the amount prayed for in the complaint was to be reduced $100.00, making the same $7604.02. (Tr. p. 188.) The verdict of the jury was for $7504.02.)

> That the court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, in that
>
> (a) Plaintiff's Exhibit 8 was not prepared by plaintiff from data or figures within his knowledge.
>
> (b) Said exhibit was prepared without the knowledge of defendants.
>
> (c) Said exhibit did not constitute a true and correct report and account of all moneys received by and due to plaintiff from the sale of the asparagus referred to in plaintiff's complaint; and
>
> (d) Said exhibit was not an original, permanent, and regular book of account kept by plaintiff. (Assignment of Error No. 14, Tr. p. 215.)

Although appellee testified that the bound pages (Plaintiff's Exhibit No. 8) were his permanent records of all *sales* during 1934 (Tr. p. 134), his testimony further showed that the bound pages were not his permanent records of *cash* received from the sale of the asparagus. (Tr. pp. 137, 139.) Appellee testified that the records produced in court (Plaintiff's Exhibit No. 8) were made in pencil by him, that after he made the entries thereon he turned it over to his bookkeeper, who entered the money received in a cash book kept in ink, which book was not produced in court. (Tr. pp. 136, 137, 138, 139.)

> "In my opinion, the ruling of the judge, with respect to the evidence in question, was clearly right. The ledger was a part of the party's own record of the matter in suit. In the case of *Prince, Executor, v. Swett,* 2 Mass. 569, it appeared from marks in the day-book, that the account had been transferred to the ledger, and the court said: 'When an account is transferred to a ledger from a day-book, the ledger should be produced, that the other party may have advantage of any items entered therein to his credit.' *To this extent, the rule seems to be undisputed; that is, the ledger is a necessary part of the proof when it affirmatively appears that it contains entries relative to the affair in suit.*" (Italics ours.)
>
> *Bonnell v. Mawha,* 37 N. J. Law. Rep. 198 (1874).

It is therefore apparent that the court erred in admitting the bound pages (Plaintiff's Exhibit No. 8) in evidence over the objection and exception of ap-

pellants that the same were hearsay, incompetent, irrelevant, not the best evidence, and not books of permanent record. (Tr. p. 141.)

> That the court erred in denying defendants' motion to strike out Plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, to which an exception was noted, for the same reasons that the court erred in admitting said Exhibit 8 into evidence as more fully appears from Assignment of Error No. 14. (Assignment of Error No. 22, Tr. p. 218.)

As appellee admitted that the bound pages (Plaintiff's Exhibit No. 8) did not show the entire amount of money received from the sale, disposition or consignment of the asparagus which appellee had negotiated for sale to appellants (Tr. p. 161), the trial court erred in denying the motion of appellants to strike same from the record, upon the ground that the same was incomplete, to the overruling of which motion an exception was noted. (Tr. p. 161.)

> "The preliminary proof showed that it was not a book kept in the usual course of business, containing *all the dealings* between the plaintiff and others, nor did it show all the dealings between the plaintiff and T. R. Landers, nor was there sufficient evidence of the correctness of the account. These book entries, therefore, do not rise in probative value above mere memoranda used to refresh the memory of a witness, as they fail in the foregoing essentials as a book of accounts. * * * These entries should not be considered of any probative value in determining whether or not there was sufficient proof to establish plaintiff's claim." (Italics ours.)
>
> *Tipps v. Landers,* 182 Cal. 771, 774.

"In order to entitle books of account to reception as evidence, it must appear that the party keeping and producing them is usually precise and punctilious respecting the entries therein, and that they are designed at least to *embrace all the items of the account* which are proper subjects of entry." (Italics ours.)

Countryman v. Bunker (Mich.), 59 N. W. 422.

"It is difficult to conceive of books of account, claimed to be correct as a basis for legal liability, which record only the debit side of an account."

Dugan v. Longstaff, 102 N. Y. Supp. 1120, 1121.

(2) Appellee's Exhibit No. 8 did not show the price for which the asparagus was sold nor the grade of the bunch asparagus sold, and therefore it could not be ascertained whether the asparagus was sold for the market or current price.

The bound pages (Plaintiff's Exhibit No. 8), furnish the following information: to whom the asparagus was shipped, the car numbers, the date shipped, the number of bunched and loose crates shipped, the alleged amount of net proceeds, and the date received. (Tr. pp. 142-151.) It is important to note that nowhere in the bound pages appears:

(1) The price the asparagus was sold for on the various eastern markets; and

(2) The classification of the bunch asparagus sold on the various eastern markets.

The importance of the failure of appellee to prove the amount for which the asparagus was sold on the eastern market and the classification of the said bunch

asparagus, is that without this proof appellee was unable to show that the market or current price of the asparagus was $22,574.84, as alleged in his complaint.

At this point, the court's attention is directed to the fact that *bunch* asparagus is classified into various grades and, as will hereinafter be pointed out, the different grades sell for different prices. H. P. Garin testified that there is a loose pack of asparagus and a bunch pack and *six grades of bunch pack,* the extra fancy, colossal, jumbo, fancy, select and extra select. (Tr. pp. 48-49.)

Section 1784 of the *Civil Code of the State of California,* reads as follows:

> "Action for Damages for Nonacceptance of the Goods. * * * (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

In an endeavor to show damages in accordance with the provisions of the above code section, appellee alleged in his complaint "that at the times said asparagus would have been ready for delivery in accordance with the said contract there was an available market for the said goods and upon said market the market or current price for the said goods at the times when the same ought to have been accepted by defendants

was in the total sum of $22,547.85; that by reason of the premises and foregoing facts plaintiff has been damaged in the sum of $7774.15." (Tr. p. 4.)

There is no evidence that the price received by plaintiff for bunched asparagus, the subject matter of this action, was the then prevailing market price, in that there was no competent evidence of the then prevailing market price. (Assignment of Error No. 9, Tr. p. 214.)

The court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit No. 9, which consists of papers entitled "The Federal Market News" and purporting to show the market value of the asparagus sold by plaintiff at the time of the sale thereof, in that said papers were not certified as authentic by the United States Department of Agriculture. (Assignment of Error No. 15, Tr. p. 216.)

So as to attempt to show that the prices for which the bunch asparagus was sold was the market or current price, appellee testified that at the time he made the entries in the bound pages (Plaintiff's Exhibit No. 8) and, in particular, the entries having to do with the net receipts, he made inquiry to ascertain the market price at which the goods were sold on the date of sale, that during the period he was shipping the asparagus he received bulletins from the Department of Agriculture showing the sales made in the different markets on the different days and as he got these reports of sales he referred to the bulletin to see whether his agents were getting the average price as compared with the price recorded by the Department of Agriculture (Tr. p. 151), that the bulletins received by him were the "Federal State Market News Service", which he obtained daily in his business of operating the Golden State Asparagus Company from the United

States Department of Agriculture, Bureau of Agricultural Economics, Ferry Building, San Francisco, California (Tr. p. 152), that he compared his returns of sale in the various markets in so far as he was able with the figures shown on the original reports that he received from the Department of Agriculture.

Over the objection and exception of appellants that the Federal State Market News Service, which consisted of 54 mimeographed pages, were hearsay, incompetent, irrelevant, immaterial, not the best evidence, and not certified documents as required under the law, the court admitted the same in evidence. (Tr. pp. 154, 167.) The court erred in admitting the Federal State Market News Service (Plaintiff's Exhibit No. 9) in evidence in that it was not admissible in evidence unless authenticated.

> "Copies of any books, records, papers or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."
>
> 28 *U. S. C. A.*, Section 661.

If we concede that the mimeographed pages (Plaintiff's Exhibit No. 9) were properly introduced in evidence, an examination thereof discloses that the market prices quoted in said exhibit are the prices for which certain classifications of bunch or loose asparagus were sold. For example, the pages show that on February 26, 1934, in Boston, the different grades of bunch asparagus sold per crate as follows: Extra select $5.50-$6.50; Select $5.00-$6.00; Extra fancy $4.00-

$4.50; Fancy $3.00-$4.00. (Tr. pp. 142-151.) As heretofore stated, an examination of the yellow bound pages (Plaintiff's Exhibit No. 8) discloses that on certain dates appellee shipped a certain number of bunched crates of asparagus, but nowhere does it appear how many crates of the various grades of bunch asparagus were shipped.

Appellants attempted to examine appellee to ascertain the quality of asparagus falling into the various classifications of bunch asparagus enumerated in the yellow bound pages (Plaintiff's Exhibit No. 8) in order that appellants could compare the grade of bunch asparagus sold by appellee and the price received therefor with the grades and prices contained in the mimeograph sheets (Plaintiff's Exhibit No. 9), upon which appellee was relying to prove market value. The trial court erroneously sustained objections to appellants' questions, and an exception was noted. (Tr. pp. 158-159.)

As the yellow bound pages (Plaintiff's Exhibit No. 8) showed only the *net* proceeds received by appellee from the various agents in the east after the agents deducted freight, commissions, sometimes cartage, and precooling, and the amount of these charges is not set forth in the bound pages (Plaintiff's Exhibit No. 8), it follows that appellee failed to prove that the sum of $22,547.85, which is the total amount shown on the bound pages (Plaintiff's Exhibit No. 8) alleged to have been received by him, was the market or current price for the asparagus, less proper charges as aforesaid, at the time the asparagus ought to have been

accepted by appellants as alleged in the complaint. (Tr. p. 5.)

In an attempt to prove the allegation in his complaint that the sum of $22,547.85 represented the market or current price of the asparagus at the time it was sold, appellee was erroneously permitted to testify by the trial court over the objection and exception of appellants, that the reports (Plaintiff's Exhibit No. 9) showed that the prices he received were in line with the prices mentioned in the reports. (Tr. pp. 153-154.)

The testimony of appellee merely expressed his opinion and conclusion and therefore was not admissible. Furthermore, the testimony was not supported by the documentary evidence. As heretofore pointed out the bound pages (Plaintiff's Exhibit No. 8) could not be compared or reconciled with the Federal Market News Service. (Plaintiff's Exhibit No. 9.) The reasons for this may be summarized as follows: The bound pages (Plaintiff's Exhibit No. 8) disclosed the net amount received by appellee and *did* not disclose the grade of the bunch asparagus shipped. The Federal Market News Service (Plaintiff's Exhibit No. 9) disclosed the price for which the various classifications of bunch asparagus were sold on various markets. It is therefore apparent that it is impossible from an examination of both Exhibits 8 and 9 to ascertain

(1) What the market or current price of appellee's asparagus was on the day that appellants allegedly should have accepted same.

(2) Whether the price appellee's asparagus was sold for on the eastern market was the market or current price.

It is obvious that appellee attempted to prove the difference between the market or current price and the alleged contract price, by merely showing the difference between the *net* amount received by him and the alleged contract price. No proof was introduced to show what the asparagus was sold for on the market and what charges were deducted therefrom in order that the court and jury could determine whether the asparagus was sold for the market or current price and whether a correct accounting was made to the appellee in connection therewith. Furthermore, appellee admitted that the bound pages did not show the entire *net* amount received by him. (Tr. p. 161.)

The only records that could be compared with the Federal Market News Service (Plaintiff's Exhibit No. 9) were the *account sales* rendered to appellee by the various agents in the east, which account sales showed the grade of asparagus sold, the price obtained and the various charges against the asparagus deducted by the agent. (Tr. p. 136.) The account sales were not offered in evidence. If we assume that the Department of Agriculture reports (Plaintiff's Exhibit No. 9) were properly in evidence, the account sales, if produced, could have been compared with the news service to ascertain if the market price had been obtained for the asparagus. Appellee testified that the account sales as rendered to him by the agents had not been de-

stroyed, were still in his possession, and kept as permanent records. (Tr. pp. 137-138.) As appellee admitted that the bound pages (Plaintiff's Exhibit No. 8) did not contain all of the moneys received by him from the disposition of the asparagus (Tr. p. 161), and that he had a cash book (Tr. p. 139), the cash book was the only competent evidence to show the amount received. The cash book if produced could have been compared with the account sales, if produced, to determine whether the checks received by appellee from the agents and entered in the cash book checked with the amounts shown on the account sales to be due to appellee. The account sales would also have shown whether appellee erred in copying the net return shown thereon upon the bound pages. (Plaintiff's Exhibit No. 8.)

That the yellow bound pages (Plaintiff's Exhibit No. 8) were not competent evidence to prove damages in the absence of the account sales, is shown by the case of *Sugar Loaf Orange Growers Ass'n v. Skewes,* 47 Cal. App. 470, the facts of which case are identical with those at bar. Plaintiff, a growers' association, sued the defendant upon an open book account. The defendant had delivered his oranges to plaintiff, who in turn had disposed of the oranges through the Mutual Orange Distributors Co., which distributors company rendered to plaintiff an *account sales* showing the receipts from the sale of the oranges and the charges for freight, refrigeration and auction commission. A witness for the plaintiff testified that he had made up the ledger account from the account sales. The defend-

ant objected to the introduction of the ledger in evidence and particularly to that part referring to the account sales. The court in affirming the decision of the lower court admitting the ledger account into evidence stated:

> "* * * In connection with the cross-examination of Mr. Wolever [plaintiff's witness], the defendant called for the said accounts of sales furnished to plaintiff by the Mutual Orange Distributors and introduced them in evidence. They are in the record as defendant's exhibit 'R', and *correspond* in amounts to the entries contained in the ledger account. No evidence to contradict them was offered by the defendant. *It appears to us that if there was any error in the reception of the ledger account in evidence as covering these items of the 'account sales', such error is cured by the introduction in evidence of said exhibit 'R' at the instance of the defendant himself.* Having been received by the plaintiff in the usual course of business, they constituted a reasonable basis of authority to the plaintiff to pay out the balance charged to it on the loss incurred by the sales and to charge to the defendant the amount so paid out by the plaintiff for his account. Considered in this light, the ledger entry itself may be regarded as the original entry of the account of the plaintiff against the defendant." (Italics ours.)

In the instant proceedings, the yellow bound sheets (Plaintiff's Exhibit No. 8) were not even a copy of the "account sales", but merely showed the alleged net return to appellee (which appellee admitted was not complete; Tr. p. 161).

That the court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, in that

(a) Plaintiff's Exhibit 8 was not prepared by plaintiff from data or figures within his knowledge.

(b) Said exhibit was prepared without the knowledge of defendants.

(c) Said exhibit did not constitute a true and correct report and account of all moneys received by and due to plaintiff from the sale of the asparagus referred to in plaintiff's complaint; and

(d) Said exhibit was not an original, permanent and regular book of account kept by plaintiff. (Assignment of Error No. 14, Tr. p. 215.)

The above assignment of error has been heretofore argued upon the point that the court erred in admitting the yellow bound pages (Plaintiff's Exhibit No. 8) in evidence for the reason that the same did not contain a statement of all moneys received by appellee from the disposition of his asparagus. (See Brief, p. 44.) However, even if the bound pages (Plaintiff's Exhibit No. 8) purported to show a statement of all moneys received by appellee from the disposition of the asparagus (appellee admitted that they did not; Tr. p. 161), and even if the bound pages purported to show an exact copy of the contents of the account sales (and they did not), the bound pages were not admissible in evidence over the objection and exception of appellants (Tr. p. 141), as appellee admitted that his cash book, which was not produced in court, disclosed the moneys received by him (Tr. p. 139) and furthermore, that the account sales were still in his possession

although not produced in court, and constituted part of appellee's permanent records. (Tr. p. 138.)

"Not only was this copy of the bill of particulars not the best evidence, but no necessity existed for its introduction, for it conclusively appears that the document was transcribed from order sheets, payrolls, and other data constituting a book of original entry * * * in the possession of plaintiff and which he might have produced, thus giving defendant and the court an opportunity to examine it, in order to determine its integrity and correctness and giving to plaintiff an opportunity to explain any errors or discrepancies therein affecting its weight as evidence. We are referred to no authority, and we know of none, holding that a party to an action may copy a book of original entry in his possession, withhold the original and prove his case by introducing such copy in evidence, while, on the contrary, numerous authorities hold such ruling to be error."

Campbell v. Rice, 22 Cal. App. 734, 736.

"* * * The bookkeeper testified that the ledger items were taken from a cash-book and cost sheets. We need not consider the cash-book since it is admitted that the payments made on account were correctly credited. The question then is whether the ledger was properly admitted, *when the cost sheets might have been produced as the primary and best evidence.* The bookkeeper said in substance: 'These items charged in the ledger are taken from slips handed me by the cost clerk. As the work goes on the workmen turn in their records and we take them from those slips. These items are correctly taken from the charges made

on the slips showing actual time and valuation of materials furnished. But I do not know whether the statements themselves are correct. I entered from the cost sheet into the ledger and it is a copy of the cost sheet.' The salesman testified that when the goods were sold (referring to the $490.71 item), he placed the order in a book. 'That book has been destroyed' * * * On cross-examination by defendant's counsel, he further testified that the figures which he had written in that book showed the price as made to Mr. Dunn, 'the same as was copied on the cost sheet'. *The facts thus shown in evidence were not sufficient to constitute the foundation necessary to authorize the admission of the ledger.*" (Italics ours.)

Preston v. Dunn, 33 Cal. App. 747.

"While the plaintiff, to prove some of the items of the account, put in evidence memoranda with the defendant's signature attached, as to the other items the only offer of proof was a book alleged to have been kept by the plaintiff in the usual course of his business. This book was kept by a clerk in the office of the hotel, who had no personal knowledge of the items of goods sold by the cigar department and the bar department of the plaintiff's hotel, and whose only knowledge was derived from slips sent to his office from these departments by a bell boy. *The original slips were not produced,* and neither of the employes who had charge of the bar or the cigar department was called to testify. Under these circumstances, we are of the opinion that the judge erred in admitting the book in evidence." (Italics ours.)

Gould v. Hart (Mass.), 73 N. E. 656.

"A custom has grown up in some parts of this state, which seems to have been followed in the present case, of giving in evidence copies of accounts, proved by witnesses to have been correctly transcribed from the books, * * * It is going quite far enough to permit the original book itself, after being inspected by the court, and subjected to the scrutiny of the opposite party, to go as evidence to the jury, and in no other way can the credit due to such testimony be properly estimated."

Moody v. J. M. Roberts Co., 41 Miss. 74.

To the same effect see

Halstead v. Cuppy, 25 N. W. 820 (Iowa).

Dodge v. Morrow, 43 N. E. 153, 154 (Ind. App.), affords an excellent summary of the soundness of the authorities relied upon herein to support appellants' contention that Plaintiff's Exhibit No. 8 was inadmissible to prove the appellee's alleged damages. The court stated in connection with the admission of books into evidence:

"* * * This class of testimony is capable of great abuse, and might often be used to work injustice. Its admission is therefore carefully guarded. In some of the states it is limited as to the amount, and is generally made dependent upon certain conditions * * * *Necessity lies at the foundation of such admission. It is only to be resorted to when no other or better means of making the proof is obtainable. When the transaction admits of more satisfactory evidence, this method should not be resorted to * * * But we are clear that such entries are not admissible unless the*

necessity therefor is shown. It was not made to appear that better evidence was not obtainable, or that the transactions did not admit of more satisfactory evidence. In fact it was made to appear that other persons were present, who knew something about some of the transactions. These persons were not called, nor was it shown that their memories had failed." (Italics ours.)

The court erred in denying defendants' motion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that plaintiff failed to introduce competent evidence to prove the alleged damages suffered by him. (Assignment of Error No. 3, Tr. p. 213.)

From the foregoing authorities it follows that appellee failed to prove the alleged damages for the reason

(1) The yellow bound pages (Plaintiff's Exhibit No. 8) were not admissible in evidence to prove the amount of the damages, in that

(a) The pages did not reflect all moneys received by appellee from the disposition of the asparagus.

(b) The pages did not show either the price for which the asparagus was sold or the grade of bunch asparagus sold.

(2) The Federal Market News Service (Plaintiff's Exhibit No. 9) was not admissible in evidence to show the market value of the asparagus, in that the same was not authenticated as required by law.

Even assuming for the purpose of argument that both Exhibits 8 and 9 were properly admitted in evi-

dence, appellee failed to prove damages in that the exhibits could not be compared or reconciled to determine whether the amount received by appellee represented the market value, for the reason that the Federal Market News Service (Plaintiff's Exhibit No. 9) disclosed the prices for which different grades of bunch asparagus were sold on various eastern markets and the yellow bound pages (Plaintiff's Exhibit No. 8) did not disclose either the grade of bunch asparagus shipped by appellee or the amount for which the asparagus was sold. The trial court therefore erred in denying the motion of appellants for a directed verdict made at the conclusion of the trial on the ground that appellee had failed to prove the alleged damages suffered by him, to the denying of which motion an exception was noted. (Tr. p. 176.)

CONCLUSION.

It is respectfully submitted that the judgment of the United States District Court in and for the Northern District of California should be reversed.

Dated, San Francisco,
April 12, 1937.

TORREGANO & STARK,
By ERNEST J. TORREGANO,
Attorneys for Appellants.

M. C. SYMONDS,
Of Counsel.

No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

VI. Page

Table of Authorities Cited

Codes

Texts

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IN THE

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Appellee.

BRIEF FOR APPELLEE.

The statement of facts as presented by appellants in their opening brief is not sufficiently full as to give the court a clear picture of the relationship and transactions between the parties. We shall endeavor to present the facts we deem essential and submit it as a supplement to those presented by appellants.

The appellee has been engaged in farming operations, particularly in growing asparagus for a period of about 20 years. (R. 18.) During the year of 1934,

the time in dispute and prior thereto, he was receiver in equity of the Golden State Asparagus Company, a corporation, whose principal business was and is asparagus farming with its lands located on Sherman, Brannan and Andrus Islands in the Delta region of Sacramento County. In February of 1934, he had as such receiver about 600 acres under cultivation in asparagus on Brannan Island. (R. 16, 17.) The witness, Krasnow, was an employee of appellants; it was his duty to find crops for appellants to purchase. (R. 95.) At Krasnow's request appellee met Rothstein at Isleton, Sacramento County, about February 10, 1934; Rothstein wanted to purchase appellee's asparagus crop then growing on Brannan Island. The appellee, Edwards, told him he was not particularly anxious to sell as he had about completed arrangements to ship his crop. Rothstein remarked he usually got what he wanted, and appellee told him that if he met his terms he could get the asparagus. They discussed the details and arrived at a satisfactory understanding save as to price. Edwards asked Rothstein $2.00 per crate f. o. b. Isleton for his entire crop of bunch asparagus shipped to April 10, 1934, and Rothstein wanted a few days to think it over; Edwards gave him 48 hours to accept or decline the price, since the crop was fast ripening. Rothstein then went to Seattle.

At the meeting between Edwards and Rothstein at Isleton Edwards told him that if he sold him his asparagus he would have to have a satisfactory bank guarantee to assure payment would be made for all asparagus that was shipped upon delivery of documents, to which Rothstein agreed; Edwards stated

he was acting as receiver and could take no responsibility on that score. (R. 17, 18.)

Rothstein told him the asparagus was to be shipped to the Eastern market—Atlantic Seaboard; Edwards told him he would ship him the same quality of asparagus that was shipped him through Garin in 1931; Rothstein said it was the quality he wanted; the asparagus shipped Rothstein in 1931 was bunch shipping asparagus. As far as Edwards knew no other kind of asparagus was shipped to the Eastern market. He told Rothstein he wanted 5¢ a pound for shipping asparagus—bunch asparagus—$1.50 per crate plus 50¢ for bunching, packing and loading on the cars at Isleton. (R. 26, 27.)

The green shipping or bunch asparagus season begins about the middle of February ordinarily and lasts until the first to the tenth of April; the canning period begins ordinarily on the tenth day of April. (R. 39, 40.)

Shipping asparagus and bunch asparagus are the same thing, and no other asparagus is shipped East. (R. 35.) Under the agreement at Isleton bunch asparagus was to be shipped during the green asparagus season up to April 10, 1934; that appellee was to do the bunching and packing; the only asparagus appellee had was on Brannan Island; he told Rothstein that the only asparagus he had was on Brannan Island. (R. 35, 37, 42, 43.) Krasnow saw the asparagus on Brannan Island (R. 45), and Rothstein knew where it was raised and produced. (R. 99.) Rothstein was interested in shipping asparagus—bunch asparagus. (R. 95, 99.)

After the meeting at Isleton Krasnow phoned Edwards and told him Rothstein would accept his offer, pay the price, and make satisfactory bank arrangements and told him to wire Rothstein at Seattle, confirming the sale, which he did. (R. 19.)

As a result of the request of Krasnow, Edwards on February 12, 1934, sent the following telegram to Rothstein at the Athletic Club, Seattle, Washington:

> "Will confirm sale to H. Rothstein and Son all asparagus shipped from Golden State Asparagus Co. up to and including Apr 10 34 $2 per crate fob cars Isleton providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid wire answer 801 Jones Avenue Oakland
>
> Geo N Edwards Receiver
> Golden State Asp. Co."
>
> (Plaintiff's Exhibit No. 2.)

On February 13, 1934, Edwards received the following telegram in reply which was addressed to the Golden State Asparagus Company, 801 Jones Avenue, Oakland, California, and reads:

> "Answering will arrange guarantee payments all bunch asparagus price mentioned expect return San Francisco last this week or first next week don't worry when we make deal with you will go through with same can draw up contract my arrival meantime figuring deal confirmed.
>
> M. H. Rothstein."
>
> (Plaintiff's Exhibit No. 3.)

On February 19th, Rothstein, Krasnow, Edwards and Dinkelspiel met in Mr. Dinkelspiel's office. Upon

their arrival Rothstein said "what are we here for? We got a deal. What are we going to discuss?". (R. 112.) He told Rothstein he wanted to arrange the bank guarantee which Rothstein promised to give; Rothstein asked him what his idea was; he replied he estimated there would be 20,000 crates of bunch asparagus which would involve about $40,000.00 and demanded an irrevocable letter of credit for $40,000.00 or Rothstein's Philadelphia bank could guarantee payment of drafts as presented. Rothstein refused, stating his bank would think he was crazy if he asked for a $40,000.00 letter of credit. Rothstein refused to put up any security whatever other than the ordinary credit of his company, and indicated the deal was off if the appellee could not deal with him on that basis; he refused to put up any guarantee whatever (R. 23, 112) and stated that he had bought millions of dollars worth of produce all over the United States and did it largely over the telephone or by telegraph and that if Edwards was not willing to accept his credit he would call the deal off. (R. 40.)

The terms "bunch grass" and "green shipping grass" as used by the trade are synonymous; that you pay for bunch asparagus; the culls are used locally; you can't afford to ship them; the value is so low (R. 40, 41); that the field run of asparagus means everything in the field; you subtract bunch pack and everything left is culls. (R. 64.)

As a result of the refusal to put up security the contract was not consummated, and the shipping asparagus or bunch asparagus which would have gone to appellants had the contract been consummated was

consigned through one Roper, a produce broker, to Eastern agents. The number of crates of shipping asparagus produced from Brannan Island was 15,161 crates which sold for $22,547.85. Had appellants fulfilled their contract the asparagus would have brought at $2.00 per crate the sum of $30,322.00. It was stipulated that the prayer of the complaint be reduced to $7604.02. The jury found certain railroad claims for damaged shipments amounted to $100.00. The jury found the damages to be the sum of $7502.02, which is the difference between $22,547.00 plus $100.00 and $30,322.00 or $7502.02.

ARGUMENT.

I.

THE STATUTE OF FRAUD HAS NO APPLICATION TO THE TELEGRAMS (PLAINTIFF'S EXHIBITS 2 AND 3) AS A CONTRACT OF SALE OF GROWING PERIODIC CROPS.

Growing crops—*fructus industriales*—are not goods or chattels within the meaning of the statute of fraud (C. C. P. Section 1724) and pass by verbal contract of sale.

> *Vulicevich v. Skinner,* 77 Cal. 239, at page 240:
>
> "We cannot concur with this view. 'Contracts for the sale of growing periodical crops—fructus industriales—are not within the statute of frauds, and therefore need not be made in writing. After some vacillation, this has become the settled doctrine.' (Marshall v. Ferguson, 23 Cal. 65; Davis v. McFarlane, 37 Cal. 636; 99 Am. Dec. 340.)"

12 *Cal. Jur.* page 876, Section 32:

"Growing crops are not chattels within the meaning of this provision of the Statute, and pass by verbal sale."

See also:

Quivey v. Baker, 37 Cal. 465;

8 *Cal. Jur.* page 683, Section 2.

Even if the court should find that contracts involving the sale of growing crops are governed by the statute of fraud still it is the contention of appellee that said telegrams constitute a good and sufficient memorandum within the meaning of the statute of fraud. This brings us to that issue.

II.

THE TWO TELEGRAMS (PLAINTIFF'S EXHIBITS 2 AND 3) CONSTITUTE A MEMORANDUM OF THE AGREEMENT OF THE PARTIES AND SATISFIES THE REQUIREMENTS OF THE STATUTE OF FRAUD.

No particular form in writing is necessary to remove a contract from the bar of the statute of fraud. Such contracts may be composed of letters or telegrams.

12 Cal. Jur. pages 899, 900, Section 63.

(a) Parol evidence is always admissible to remove apparent ambiguities or uncertainties from the face of a written contract to ascertain the identity of the subject matter and to explain the usage or meaning intended of trade terms.

While as a general rule the memorandum must contain the essentials of a contract, save those supplied

by implication of law, these essentials need not be set forth with such particularity as to foreclose any resort to parol evidence to ascertain the intention of the parties as to the identity of the subject matter where ambiguous or uncertain, or the meaning of trade terms employed in a contract where such trade terms are unknown to laymen; that while essentials of which the contract is silent may not be supplied by parol evidence, a resort to such evidence may be made to explain essentials which are uncertainly or ambiguously expressed.

59 *A. L. R.* pages 1423, 1424, Division 3;
30 *A. L. R.* page 1167, Division 3.

It simply involves the application of the maxim which substantially holds that to be certain which can be made certain. Thus, in *Rohan v. Proctor,* 61 Cal. App. 447 at page 455 it was said:

> "In order to the validity of the written agreement for a lease it must either be in itself certain as to the kind and character of the improvements to be made upon the premises, the completion of which would fix the beginning of the term, *or it must be susceptible of being made certain by oral evidence showing the prior or contemporaneous understanding of the parties in that regard.* But if the parties have come to no such understanding at the time the written agreement is made, the uncertainty of the writing in that regard is fatal, since it is an uncertainty in a respect essential to its validity which no amount of oral evidence as to a later understanding could remove. The effect of such evidence would merely be to create an additional oral agreement touching a

vital and omitted essential of the writing and thus render the entire contract between the parties oral and hence of necessity obnoxious to the statute of frauds." (Italics ours.)

It will be noted that the telegrams in dispute point to and confirm a prior verbal understanding.

Again, in *Brewer v. Horst & Lachmund,* 127 Cal. 643, at pages 646 and 647:

"The only question presented for decision is, Did these telegrams constitute a sufficient note or memorandum of the contract to satisfy the requirements of the Statute of Frauds? The trial court, by its judgment, answered this question in the affirmative. And, in view of all the facts found, we think the court reached the proper conclusion. If there were nothing to look to but the telegrams, the court might find it difficult, if not impossible, to determine the nature of the contract, or that any contract was entered into between the parties. But the court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all the circumstances under which it was made; and, if, when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used; and their meaning may be explained as it was understood between the parties. (Mann v. Higgins, 83 Cal. 66; Berry v. Kowalsky, 95 Cal.

134; 29 Am. St. Rep. 101; Callahan v. Stanley, 57 Cal. 476.) Also: *'Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject matter, and to explain all terms and phrases used in a local or special sense'."* (Italics ours.)

It will be observed in point of fact both cases have peculiar application to the case before the court.

Again, in *Tennant v. Wilde,* 98 Cal. App. 437, at page 445:

> "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between, and declarations of, the parties during the negotiations at and before the time of the execution of the contract may be shown."

See also:

Johnson v. Schimpf, 197 Cal. 43;
Preble v. Abrahams, 88 Cal. 245, 250-251;
Mann v. Higgins, 83 Cal. 66, 68-69;
Diffendorf v. Pilcher, 116 Cal. App. 270, 272;
Sanchez v. Yorba, 8 Cal. App. 490.

And where, as to certain of its terms, a written contract is ambiguous or uncertain as to the meaning intended by the parties, or as to the meaning or usage

of trade terms employed, and where parol evidence as to such facts and circumstances are disputed, they become questions of fact for the jury.

O'Connor v. West Sacramento Co., 189 Cal. 7, 18;

California W. D. Co. v. Cal. M. O. Co., 178 Cal. 337, 343.

Seymour v. Oelrich, 156 Cal. 782, cited by appellants, lacks point. There the plaintiff sought to supply essential terms and provisions on which the alleged contract was absolutely silent.

(b) The telegrams in dispute (Plaintiff's Exhibits 2 and 3) when read in the light of the evidence show an absolute and unqualified acceptance by appellants of the offer of appellee.

The phrase used by appellee in his telegram (Plaintiff's Exhibit 2) with relation to the subject matter of the contract is *"all asparagus shipped"* and not merely *"all asparagus"*. The phrase *"all asparagus shipped"* means and meant to the parties *"all shipping asparagus"* and *"shipping asparagus"* and *"bunch asparagus"* are one and the same thing in the usage and parlance of the asparagus trade as shown by the evidence and as found by the jury.

In this connection appellee testified: He told Rothstein at Isleton that he would ship him the same kind he shipped through Garin, bunch—shipping asparagus; that as far as he knew no other was shipped East; Rothstein said it was to be shipped to the Eastern market. (R. 26.) Appellee meant all shipping asparagus in the telegram; "shipping asparagus" and "bunch asparagus" are practically the same thing;

"shipping asparagus" or "bunch asparagus" is all that is shipped back East; culls are not shipped East, the value is too low. (R. 35, 41.)

Garin, a witness called by appellants, testified: Green merchantable shipping asparagus would be the same as bunch asparagus. (R. 49.)

Markham, a witness called by appellants, testified: Shipping asparagus is asparagus suitable for Eastern shipment; the words "field run" mean everything in the field. You subtract "bunch pack" in the field and everything left is culls. (R. 63, 64.)

While Rothstein testified: He wanted bunch asparagus; he was interested in "shipping asparagus"; that there is no difference between "all shipping asparagus" and "all green shipping asparagus". (R. 40, 75, 86, 95, 101.) That when you buy a grower's entire crop of "bunch asparagus" you do not specify so many crates of colossal and so many crates of this and that (R. 97); that the asparagus he buys goes principally to the Eastern seaboard; that he does not sell in the local market. (R. 100.) By drawing into the dispute, the various grades of bunch or shipping asparagus, such as colossal, jumbo, extra fancy, etc., serves simply to confuse the issues. They are not material, since the entire crop of bunch or shipping asparagus was sold regardless of grades. (R. 44, 97.)

Again, aside from the testimony it is admitted by appellants that the offer contained in appellee's telegram was to sell appellants *"all shipping asparagus"*. (Appellant's Assignment of Error 34, R. 225-226.)

Again, appellants telegram of acceptance (Plaintiff's Exhibit 3) contains the following: "* * * *Meanwhile figuring deal confirmed"*. This confirmation is an unqualified acceptance showing that the minds of the parties had met; to contend otherwise appellants blow hot and cold.

The contention of appellants that there is no proof that the phrase "satisfactory bank guarantee" in appellee's telegram (Plaintiff's Exhibit 2) and the phrase "will arrange guarantee" contained in appellants' telegram of acceptance (Plaintiff's Exhibit 3) have *not* the same meaning, and that the burden to prove the same meaning was intended is on appellee, is entirely without merit. The one phrase is not contradictory or inconsistent with the other. The phrase employed by appellants is simply more comprehensive and general and includes within its terminology the phrase used by appellee. It may be reasonably construed as arranging the guarantee demanded.

If the phrase used by appellants as to the guarantee is ambiguous and susceptible of two interpretations, one in favor of appellee and the other opposed, the one favorable to the appellee will be adopted since appellants caused the ambiguity or uncertainty. Such uncertainties and ambiguities are to be interpreted most strongly against the one who prepared the instrument and caused the uncertainties to exist. The instrument in dispute was prepared by Rothstein.

Civil Code of California, Section 1654;
Payne v. Newal, 155 Cal. 46;
Hoff v. Lodi Canning Co., 51 Cal. App. 299;

6 *Cal. Jur.* page 307, Section 185;
13 *Corp. Jur.* page 283, Section 87-3.

In 6 *Cal. Jur.* supra, at the place indicated, it was said:

> "Any uncertainties existing in an agreement are to be interpreted most strongly against one who prepared the instrument and caused the uncertainties to be present."

(c) There was a clear and unequivocal meeting of minds of the parties as to the subject matter of the contract.

The contrary contention of appellants, we believe, has been fully answered in the preceding subdivision. Complaint, however, is made that it does not appear in amount as to what would constitute a satisfactory bank guarantee, or the amount of asparagus which would be shipped without resort to parol proof. Aside from the estimate of 20,000 crates of bunch or shipping asparagus estimated by the parties (R. 113), the matter is not one for subsequent settlement or agreement. The agreement to furnish a satisfactory bank guarantee means one satisfactory to appellee who is the sole judge, the only limitation is that he act in good faith.

Thus in 13 *Corp. Jur.* Section 768-2 at pages 675 and 676, it was said:

> "Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1) Where fancy, taste sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. *In contracts in-*

volving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not. The rule also applies to a contract providing that security for its performance shall be satisfactory." (Italics ours.)

Again, in *Brenner v. Redlick Furniture Co.,* 113 Cal. App. 343, at pages 346 and 347:

"Upon oral argument counsel for appellant further pointed out that contracts under which a party agrees to perform to the satisfaction of another fall into two classes: First, where fancy, taste or judgment is involved (Tiffany v. Pacific Sewer Pipe Co. 180 Cal. 700 (6 A. L. R. 1493, 182 Pac. 428); second, where the question is merely one of operative fitness or mechanical utility. (Thomas Haverty Co. v. Jones, 185 Cal. 285 (197 Pac. 105); Bruner v. Hegyi, 42 Cal. App. 97 (183 Pac. 369).) It is contended by appellant that the present case falls within the second class, in which dissatisfaction is no defense where the other party performs in a reasonably satisfactory manner or, in other words, in a manner which would be satisfactory to a reasonable man. A review of the authorities leads us to the conclusion that this case falls within the first class above mentioned and that it was a sufficient defense in the absence of bad faith to show that respondent was in fact dissatisfied. No suggestion of bad faith has been made."

See also:

Coates v. General Motors, 3 Cal. App. (2d) 340, 347;

Schuyler v. Pantages, 54 Cal. App. 83, 85;

Van DEMark v. California H. E. Assn., 43 Cal. App. 685.

Nor is the amount of the asparagus sold open to future agreement. It is definitely all "bunch" or "shipping" asparagus grown and harvested on Brannan Island for the 1934 green shipping asparagus season which ends April 10, 1934. That is certain which can be made certain. Absolute certainty will be secured upon harvest.

In this connection *Moayan v. Moayan* (Ky.), 72 S. W. 33, the headnote supported by the decision reads:

> "A contract to convey a third of all one's estate, of whatever nature, acquired by him, under his mother's Will; or otherwise acquired and now owned by him sufficiently describes the property, as it may be identified by parol evidence, to satisfy the Statute of Frauds."

Again, in 25 *R. C. L.* Section 279, page 648, it was said:

> "While the designation of the goods sold cannot be left entirely to parol proof, a description thereof is not necessarily insufficient because on its face it may be too general or indefinite to be applied to any particular property. In such a case the situation of the parties and the surrounding circumstances at the time of the sale may be shown to apply to the contract, to the subject matter, and if where so applied the subject matter may be established with reasonable certainty it is sufficient."

Again, in *Johnson v. Schimpf,* 197 Cal. 43, at page 48:

> "The description may be supplemented by extrinsic evidence showing its application to particular property to the exclusion of all other property. Parol evidence is ordinarily admissible to show what property the parties intended to convey and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject matter of the contract."

See also, authorities cited supra, subdivision (a).

Neither *Weinburgh v. Gay,* 27 Cal. App. 603, nor *Baird Investment Co. v. Harris,* 209 Fed. 291, are in point. Both involve terms and provisions left open to future agreement of the parties. That none were left open in the case *sub judice* we point to the confirmation of the deal by appellants. No useful purpose can be achieved by an analysis of all the cases cited by appellants; in each of them either essentials were entirely omitted or left open to future agreement. However, we might state that in *Hamby v. Truitt,* 81 S. E. 593, quoted by appellants, the missing element was the weight of the bales and no evidence was introduced showing custom or usage as to weight. If a standard weight by custom or usage existed parol evidence thereof would have been admissible.

Harris v. Vallee (Ga. App.), 116 S. E. 642;
Nut House v. Pacific Oil Mills (Wash.), 172 Pac. 841;
29 *A. L. R.* 1222.

And as to price where left blank in the contract, the payment of the reasonable value thereof is implied.

Dickinson v. Ohashi Importing Co., 61 Cal. App. 101;
30 *A. L. R.* 1166.

The complaint that testimony was erroneously admitted over the objection and exception of appellants as to the sense in which the phrase "satisfactory bank guarantee" was understood by the parties before and after the exchange of the telegrams is also without merit. Appellants denied an unqualified acceptance with relation to the character of the guarantee to be furnished by the phrases employed in the telegrams, and the court apparently believed an ambiguity or uncertainty was present, hence a proper resort to the negotiations and surrounding circumstances, the demand for a satisfactory bank guarantee by appellee and the promise to furnish one by Rothstein at the Isleton meeting. (R. 18.) Again, upon demand for fulfillment at Mr. Dinkelspiel's office appellee was bound to name the amount and character of it. Again, if error, it was harmless since appellee was the sole judge as to what would constitute a satisfactory bank guarantee.

Moreover, it was appellants who first sought to define the phrase "satisfactory bank guarantee" and its use in the asparagus trade. (R. 46-47, 50-63.)

And finally, the admission of this testimony was not assigned as error and is not properly before this court for review.

Nor was the objection to the testimony of appellee as to his opinion with relation to the meaning intended by the use of the phrase "all asparagus shipped" in his telegram or as to the binding force of the contract well taken, since it involves a state of mind. However, if it be error it is harmless and unprejudicial to appellants. Moreover, no exception was taken to this testimony (R. 22) and consequently was not saved for review.

Edwards v. U. S., 7 Fed. (2d) 257, 358;
Fleischmann Construction Company v. United States, 270 U. S. 349, 70 L. Ed. 624;
Buessel v. United States, 258 Fed. 819.

And finally, Rothstein was permitted in his direct examination to give his interpretation of appellee's telegram (Plaintiff's Exhibit 2) and as to what he meant by the use of the clause "don't worry when we make deal with you will go through with same". (Plaintiff's Exhibit 3.) He was also permitted in direct examination over the objection and exception of appellee to testify he did not consider himself bound by his telegram. (R. 85, 86.)

Nor is there merit to the contention parol evidence is not admissible to show the meaning intended by the parties to the use of words used in the writing, which are otherwise uncertain. The contrary rule is recognized in *American Sugar Refining Co. v. Holdin, etc.,* 286 Fed. 685, cited by appellants. (See also authorities supra.)

Nor is there any merit to the contention appellee did not rely on the telegrams as a contract, but on the

oral contract at Isleton, having instructed Mr. Dinkelspiel to draw up a contract in accordance with the arrangements at Isleton. Edwards testified the agreement at Isleton was embodied in the telegrams and that he gave Dinkelspiel the two telegrams and suggested he draw up a contract in conformity with the telegrams as a convenient memorial. (R. 30, 31.)

(d) The telegrams as a contract were mutually binding on the parties.

It is argued the contract lacked mutuality since the use of the phrase "all asparagus shipped" imposed no obligation to ship any asparagus. Appellants ask how much asparagus was appellee bound to ship during the term specified? Our reply is all the shipping or bunch asparagus grown on Brannan Island which is subject to exact admeasurement upon harvest during the period agreed, the green asparagus season. The appellee had under cultivation 600 acres of asparagus on Brannan Island. At Isleton they discussed the kind of asparagus to be shipped (R. 16-19); no other is shipped East. At Isleton Rothstein was told the only asparagus appellee grew was on Brannan Island. (R. 42.) Rothstein was familiar with the region and knew where the asparagus was raised and produced. (R. 95, 99.) There was a full understanding between the parties save the price which appellee gave Rothstein 48 hours to consider. The offer made to Rothstein at Isleton was confirmed by telegram and accepted in the same manner. It has been heretofore shown that appellants were not in doubt as to the amount or kind of asparagus purchased (Assignment of Error 34,

R. 225-226); or the binding force of the telegrams as a compact or contract by express confirmation thereof. Plainly, there is no merit to this objection.

The case of *Hazelhurst Lumber Company v. Mercantile Lumber and Supply Co.,* 166 Fed. 191, quoted by appellants lacks application. In that case the defendant agreed to purchase all ties plaintiff could produce and ship, which is quite different than selling a growing crop of produce, the amount of which can be reduced to a certainty. A similar objection applies to *Ellis v. Denver L. G. R. Co.,* 43 Pac. 457. In that case there was no way to determine the amount of the various grades purchased. In neither of them was there any prior understanding. Where, however, a prior oral understanding exists resort may be had thereto to identify the subject matter where it is referred to in the memorandum.

Brewer v. Horst & Lachmund Co., supra;
Preble v. Abrahams, supra;
Diffendrof v. Pilcher, 116 Cal. App. 270, 272;
Rohan v. Proctor, supra.

In the case last cited the court turned to a prior oral understanding to determine the extent and character of the alterations and additions the lessor agreed to make, which was only generally referred to in the memorandum of the agreement to lease. The court indicated that in the absence of the prior oral understanding the memorandum would have come within the bar of the statute of fraud.

No useful purpose can be achieved by answering subdivision IV of Division I of appellants' brief, to

the effect that the writings disclosed a counter-offer. It would simply involve repetition. The contention has already been fully answered to the effect that there was a binding offer and acceptance by the parties by force of said telegrams.

III.

APPELLANTS ARE ESTOPPED TO DENY SAID TELEGRAMS (PLAINTIFF'S EXHIBITS 2 AND 3) CONSTITUTED A BINDING CONTRACT.

The acceptance or confirmation by appellants in their telegram of the offer or confirmation of sale contained in appellee's telegram, having been absolute and unqualified they may not now be heard to repudiate or deny it. They are estopped by the application of the maxim, "that one cannot blow hot and cold".

10 *Cal. Jur.* page 465, Section 25;
Emeric v. Alvarado, 64 Cal. 529;
Transmarine Corp. v. R. W. Kinney Co., 123 Cal. App. 411, 424-425.

IV.

NO VARIANCE EXISTS BETWEEN THE PROOF AND THE PLEADINGS, NOR HAS THE ISSUE RAISED BEEN SAVED FOR REVIEW BY THIS COURT.

We are unable to find any objection or exception in the record to the admission of the telegrams (Plaintiff's Exhibits 2 and 3) in the evidence upon the ground of variance and the error assigned (Assign-

ment of Error 4, R. 213) and referred to does not raise the point hence, there is no issue of variance before this court. Not only must the ground of variance be urged in the trial court by proper objection and exception, but it must specify in what the variance consists.

Illinois Car & Equipment Co. v. Linstroth etc. Co., 112 Fed. 737.

Nor will the court consider questions not raised by assignment of error.

Cole & Wharf Co. v. McWilliams Inc., 59 Fed. (2d) 979, 981;

Pilson v. Roedeffer et al., 61 Fed. (2d) 976.

Again, if a variance did exist it is immaterial, since it does not appear, nor is it claimed by appellants that they were surprised or misled. In the absence of prejudice in this regard a variance cannot be considered material or substantial.

21 *Cal. Jur.* page 263, Section 183.

"A material variance is one which has misled the adverse party to his prejudice in maintaining his action or defense on the merits."

On page 276, Section 93, it was said:

"As a general rule, a variance between pleadings and proofs might have been obviated by amendment is deemed waived, unless properly objected to at the trial."

See also:

Jackson v. United States, 297 Fed. 20.

However, no variance exists between the proof and pleadings. It has already been shown that the parties

fully understood each other in all respects by the exchange of said telegrams and with the aid of parol evidence properly admitted in the evidence. To again point to such proof is to indulge in repetition.

V.

THE MOTION FOR A DIRECTED VERDICT BY APPELLANTS WAS PROPERLY DENIED.

(a) Where a conflict of the evidence exists the issue is one of fact for the jury.

This rule applies to conflicts of parol evidence introduced to remove ambiguities and uncertainties in written contracts, and where they exist as to the usage of trade terms in such contracts. This applies with peculiar force to the conflicting evidence introduced to remove the ambiguities and uncertainties on the face of the telegrams, and to explain the usage of trade terms employed.

> *O'Connor v. West Sacramento Co.*, 189 Cal. 7 at page 18:
>
> "If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances. *On the other hand, if such circumstances are in dispute and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury,* but

in no case can the proper construction of the contract be left to a jury. (California W. D. Co. v. California M. O. Co. 178 Cal. 337, 341 (177 Pac. 849).)" (Italics ours.)

(b) **Where a conflict of the evidence exists the judgment will not be disturbed by the Appellate Court.**

Illinois Power and Light Co. v. Hurley, 49 Fed. (2d) 681;

Philadelphia Storage Battery Co. v. Kelly-How-Thomas Co., 64 Fed. (2d) 843;

C. M. St. P. & P. R. Co. v. Linehan, 66 Fed. (2d) 373.

Indeed, the reviewing court does not weigh the evidence. It simply ascertains if there is substantial evidence in support of the verdict. In considering such evidence the testimony of appellee must be accepted as true, and appellee is entitled to all favorable inferences reasonably drawn from such evidence.

Chicago B. & Q. R. Co. v. Kelley, 74 Fed. (2d) 80, 82.

It is said the court labored under a misapprehension as to the law applicable to facts, and an instruction by the court (R. 183) is pointed to as an illustration. The instruction in question, in view of the others, given by the court, does not merit the construction given it by appellants. However, no point is made that it constituted substantial error, in view of which we shall not give it further consideration, other than to say that it has not been saved for review by this court because no specific objection or exception has been taken, nor has it been assigned as error.

VI.

THE DAMAGES AWARDED APPELLEE BY THE JURY HAVE BEEN SUFFICIENTLY PROVED BY THE EVIDENCE, AND SUCH EVIDENCE WAS ADMISSIBLE IN PROOF THEREOF.

It is contended by appellants that there has been a failure of proof as to damages and that the court erred in admitting appellee's sales account (Plaintiff's Exhibit 8, R. 142-151) over the objection and exception of appellants; that the court also committed error in admitting in the evidence "The Federal Market News" (Plaintiff's Exhibit 9, R. 169-172) over the objection and exception of appellants. The bulletin set forth in the record is simply a specimen copy, the balance of the exhibit being omitted in the interest of economy.

Inasmuch as the assignments of error relating to the introduction of Plaintiff's Exhibit 8 (Assignments of Error Nos. 8, R. 214; 37, R. 226; 14, R. 215) and assignment of error relating to Plaintiff's Exhibit 9 (Assignment of Error No. 15, R. 216) violate Rules 11 and 24 of this court for the failure to set forth the grounds of objection and exception urged at the trial, they are not properly before this court for review. Aside from this question, however, there is no merit to the objections and exceptions taken to the admission in the evidence of either said sales account, or the "Federal Market News". The objections to the introduction of the sales account were that it was hearsay, and not a permanent record (R. 137, 141); and the reasons are in substance as follows:

1. That said sales account (Plaintiff's Exhibit 8) did not show the total amount of monies received by appellee for the *sale* of said asparagus.

2. That said sales account is not a permanent record of the monies received from the *sale* of said asparagus.

3. That said sales account was prepared from figures and data not within the knowledge of appellee.

4. That said sales account did not show the price for which it was sold, nor the grades sold.

The specific objections assigned to the introduction of the "Federal Market News" (Plaintiff's Exhibit 9) are that they were not the best evidence since they were not certified documents. (R. 154.)

We shall now direct our attention to the objections taken to the introduction of the sales account (Plaintiff's Exhibit 8) as evidence, and its value in proof of damages.

(a) Appellee's sales account (Plaintiff's Exhibit 8) was sufficient as proof of the amounts received for the sale of the asparagus, and constituted both a permanent record and original entry.

This sales account was kept in a loose-leaf folder by the appellee personally. (R. 141.) It was his permanent record of sales made by his agents for asparagus shipped during the season of 1934; the entries are in his handwriting made at the times the asparagus was shipped and at the times he received payment covering each shipment; they are regularly kept from day to day; the asparagus is shipped through Roper, his agent, who notified him each day as shipments were made; when the selling agents sold the goods he was

rendered an account of sales showing the amount of money obtained for individual shipments; when the goods are sold in the East an account is made up which contains the same car number Roper gave him when the shipment was made; the number of crates and grades sold, and the price; the agent deducts the freight, the commission earned or any charges he pays out on the other end and sends him a check together with the account of sales; Roper consigned the asparagus to the different agents in the East; the sales reports he receives from the different agents he also keeps as a permanent record; all original communications are kept; he calls his sales account his 1934 asparagus sales; after these entries are made they are turned over to his bookkeeper who enters them in the cash book. (R. 134-139.)

A small amount was received from the railroad company the following year covering damages to asparagus during shipment, which was turned over to his bookkeeper and entered in the books. It would amount to forty or fifty dollars. Since he has been receiver for the Golden State Asparagus Company to the best of his recollection the annual recovery from railroad claims would not exceed $100.00; in prior years the volume or amount of shipments were greater than in 1934. (R. 163, 164, 166.) The jury found the amount to be $100.00. The evidence was sufficient from which the jury could base a finding as to the loss covered by the railroad claims. Again, no point is made by defendants as to the sufficiency of this evidence other than it was not entered as a sale in plaintiff's sales account. Moreover, no proper objection or

exception was taken to it during trial or saved for review by this court by proper assignment of error.

Appellants proceed upon the theory that the sales account (Plaintiff's Exhibit 8) does not reflect the entire amount received by him from *sales* of asparagus, because the account does not include the amount paid by the railroad company for damages to shipments. Plainly this item does not constitute a sale of asparagus, but damages for injuries to asparagus shipments; there is no pretense by appellants that any asparagus was sold the railroad company, and the items of course would have no place in the sales account. Nor was it necessary that the sales account as prepared by appellee from the sales reports of agents should set forth the gross sales price, or gross market price, or the specified grade of asparagus sold. There was no claim during the trial of the case that the net amount received by appellee from the sale of the asparagus was incorrect, or that the damages are to be calculated from the gross sales price, rather than the net sales price, hence it was sufficient that the account covered the net sales price from which the damages could be readily calculated by the jury. It will be observed the sales account of appellee sets forth the date of shipment; the car number; the character of the asparagus, whether loose or bunched in crates; the net return and the date thereof. The number of crates sold was 15,161, the net total amount received for the sale of said asparagus was $22,547.85, and the amount of damages paid by the railroad was $100.00 as found by the jury. The amount which appellee would have received from appellant for 15,161

crates at $2.00 per crate had they performed their contract is $30,322.00 and the difference between the amount for which appellee sold the asparagus plus the railroad claim paid and $30,322.00 would give the amount of damages suffered by appellee. The point of shipment in either case was Isleton where the asparagus was grown, and the contract of sale to appellants was f. o. b. Isleton.

It is next asserted that the sales account is hearsay and not a permanent record. All books of account and transactions out of court are hearsay. They are admissible under an exception to the hearsay rule when a proper foundation is laid. This rule is too elementary to require citation of authority and the proper foundation was laid to the effect that the entries were made at or near the time of the transaction they record; it is a book of original entries and regularly kept in the regular course of business.

In *Landis v. Turner,* 14 Cal. 573, a book in which entries were made from a slate was held to be a book of original entry and admissible in the evidence.

In *Idol v. San Francisco Construction Co.,* 1 Cal. App. 92, 94, entries from way bills were held to be original entries.

In *Storm & Butts v. Lipscomb,* 117 Cal. App. 6 at page 19, it was said:

> "These daily reports were admitted into evidence over the objection of the defendant, the objections going principally to those portions thereof as are based on information obtained by the witness from the foreman on the work at the

time when he was not there. The foreman kept this data for Smith, the timekeeper, under his direction. These memorandums and time sheets were made up daily. It clearly appears that the records made up from the memorandums in the manner stated, would constitute original records."

See also:

Patrick v. Tetzlaff, 46 Cal. App. 243;

Sugar Loaf O. & S. Co. v. Skewes, 47 Cal. App. 470.

And, in this regard, Section 1947 *Code of Civil Procedure* provides:

"Copies of entries also allowed. When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals."

Under the provisions of this section of the Code it will be noted that the sales account and the entries in the cash book by the bookkeeper of appellee may both be regarded as original entries.

And while the entries made by appellee in his sales account are permanent records, it will be noted that in *Storms & Butts v. Lipscomb,* supra, at pages 19 and 20, the entries may be either original or constitute a permanent record to be admissible in the evidence.

Nothing can be accomplished by an analysis of the authorities cited and quoted by appellants on this subject. It is sufficient to say they have no application. As an illustration in *Tipps v. Landers,* 182 Cal. 771, cited and quoted by appellants, the evidence

plainly shows the book was not a record in the regular course of business. The entries were shown to be not only incorrect but that pages were missing and was otherwise highly untrustworthy. There is no pretense that any such objections could be made against the probative value of appellee's sales account.

It is next contended that the sales account of appellee was not prepared from data and figures within his knowledge. The data upon which appellee's sales account was based consisted of sales reports made in the regular course of business by the agent or agents employed by appellee whose duty it was to make such reports and which reports were compiled by such sales agents at the time of the sales transactions. The sales reports having been made under the circumstances just enumerated, the sales account of appellee is admissible in the evidence as proof of its contents. Any other rule would impose such a hardship on business as would defeat its ends. Surely, appellee is not expected to secure the testimony of each of his Eastern sales agents when business experience has shown reports of the character indicated to be trustworthy when done in the regular course of business.

In this regard it was said in *Patrick v. Tetzlaff,* 46 Cal. App. 43, at pages 245 and 246:

> "It would be to impose a most difficult rule upon the commercial world to hold that, notwithstanding ample proof as to the original character and regularity of the keeping of accounts, there must be in addition an affirmative oath on the part of the tradesman or shopkeeper producing them that they are absolutely correct. In large

establishments employing a great multitude of clerks this proof would be in many cases beyond reach."

In this case shop cards were kept by employees in the regular course of business covering services rendered and materials furnished in an automobile repair shop. They were held admissible in the evidence as prima facie evidence without further testimony as to their accuracy.

In *Sugarloaf O. & G. Assn. v. Skewes,* 47 Cal. App. 470, cited by appellants, entries in a ledger made by the witness and taken from sales accounts covering sales of oranges by auction by Eastern representatives in Cleveland, New York and Boston were admitted in evidence. In this connection the court said on page 473:

> "Having been received by the plaintiff in the usual course of business, they constituted a reasonable basis of authority to the plaintiff to pay out the balance charged to it on the loss incurred by the sales and to charge to the defendant the amount so paid out by plaintiff for his account. Considered in this light, the ledger entry itself may be regarded as the original entry of the account of the plaintiff against the defendant."

The ledger in this case as one of original entry cannot be differentiated from the sales account kept by appellee, both of which were based upon sales reports from Eastern representatives or agents. The fact that these sales reports were made in the regular course of business was held sufficiently trustworthy.

The case therefore is clear authority for the introduction of appellee's sales accounts in the evidence as proof of its contents.

Chan Kiu Sing v. Gordon, 171 Cal. 28;
Storm & Butts v. Lipscomb, supra, at pages 18 and 19;
Shields v. Rancho Buena Ventura, 187 Cal. 569;
Roseville etc. v. Daniel (Ky.), 91 S. W. 691.

Again, appellee checked the gross sales prices of the asparagus sold as shown by the sales reports of his agents as against the daily report of asparagus sales as to price, grade and place sold with the daily bulletins of the "Federal Market Service" of the United States Government, and found the prices his agents secured were in line with those shown by the government market reports. (R. 151-154, 167.)

(b) Appellee's sales account (Plaintiff's Exhibit 8) is admissible in the evidence as proof of its contents as an itemized summary by express statutory permission.

Section 1855, Subdivision 5, of the *Code of Civil Procedure of California* provides:

"CONTENTS OF WRITING, HOW PROVED. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

* * * * * * *

"5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

In *Wilson v. Alcatraz Asphalt Co.,* 142 Cal. 182, at page 189:

> "The claim is made that it was error for the court to permit the witness Bell to summarize the testimony as to oils purchased by defendant from other parties and the additional cost to plaintiff. No reason is given as to why it was error, and we do not perceive any. The jury were not required, nor was the court required, to make calculations involving many additions and subtractions in figures. The course pursued was the proper one. (Code Civ. Proc. sec. 1855 subd. 5; Greenleaf on Evidence, 16th ed. sec. 563h, and cases cited.)"

Again, in *Globe Mfg. Co. v. Harvey,* 185 Cal. 255, at page 261:

> "No question was raised as to the reasonableness of these charges.
>
> (3) An itemized summary of the expenditures of defendant under the contract was admitted in evidence under the issue of damages. Plaintiff assigns this as error, for the reason that the person who kept defendant's books did not testify to their correctness. The statement, or summary, was admitted under subdivision 5 of section 1855 of the Code of Civil Procedure, because the original consisted of 'numerous accounts or other documents which cannot be examined by the court without great loss of time'. Defendant maintains a card system of bookkeeping and testified that he personally made up the statement in question by going over the cards and checking up the entries thereon with the original bills which he retained and which he knew had been paid."

See:

McPherson v. Milling Co., 44 Cal. App. 491, 495;

People v. Kawano, 38 Cal. App. 612, 614;

Shea v. Sewage & Water Board (La.), 50 So. 166.

If the court will examine the sales account of appellee it will be found to be made up of numerous items constituting individual sales made by some 15 or 16 agents. Each of these sales is represented by a sales report containing the grade of asparagus sold and the gross sales price and the deduction for freight, sometimes cartage, frequently commissions, etc. (R. 136), presenting a proper case for a summary.

The sales reports of appellee's agents were available; the appellee kept them as permanent records, yet no demand was made for them by appellants upon which to cross-examine appellee. No charge was made that these sales reports or the sales accounts prepared by appellee were incorrect. The sole charges were that appellee's sales accounts constituted hearsay, and was not a permanent record.

(c) There was competent evidence in the record showing the grade and market price of the asparagus sold by appellants' agents.

We have already shown that appellee's sales account was admissible in the evidence as a record of original or permanent entries or as a summary of the transactions, and that if appellants had desired the sales report showing the gross market sale prices and the

grade sold they had to but ask for them. Having failed to do so they cannot now object on appeal.

It is asserted that the trial court committed error in admitting in evidence the "Federal Market News" over the objections and exception of appellants upon the ground that they had not been certified by the United States Department of Agriculture. These were daily bulletins issued by the "Federal-State Market News Service"; United States Department of Agriculture, Bureau of Agricultural Economics, showing reports from important markets of daily sales of asparagus to jobbers shipped from California. (R. 167.) During the period appellee shipped asparagus he received these bulletins daily and as he received the sales reports from his agents he compared them with these bulletins to see if his agents were getting the proper prices (R. 151), and the prices they were receiving he found to be in line with those shown by these bulletins. (R. 153.)

Section 661 of 28 *U. S. C. A.*, cited, requiring the authentication of certain government documents for purposes of proof, plainly has no application to this market service. Like other market reports, in trade journals, or newspapers, which by their very nature are of necessity based upon hearsay, are admissible under an exception to the rule, where they have been accepted as reliable.

Thus in 22 *Corpus Juris* page 929, Section 1135-d, it was said:

> "Market quotations. Prices current, and reports of the state of the market published in the

newspapers or otherwise in general circulation and relied on by the commercial world are held admissible on an issue as to value."

See also:

22 *Corpus Juris* page 188, Section 152-ee;
The Blandon, 35 Fed. (2d) 933;
Rice v. Eisner, 16 Fed. (2d) 359, 361;
United States v. Mid Continent Corp., 67 Fed. (2d) 37.

The fact that the Federal Market Reports as to the gross market prices of the various grades of asparagus sold in the vicinity where the asparagus of the appellee were sold were as appellee stated in line with the prices received by his agents, the sales reports of such agents upon which the sales account of appellee were based are conclusively shown to be trustworthy and dependable. Indeed, it is tantamount to a foundation at least as reliable if not more so than if the Eastern agents had taken the stand and sworn to their accuracy.

In conclusion appellee respectfully submits that the verdict and judgment are consonant with principles of equity and justice and should remain undisturbed.

Dated, San Francisco,
June 14, 1937.

DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellee.

No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as co-partners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Codes

Texts

[Appellants were heretofore granted leave to file a closing brief not to exceed 35 pages.]

No. 8412

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APPELLANTS' REPLY BRIEF.

Appellee's statement of facts consists mainly of conclusions drawn from the testimony and is incorrect in several respects, most important of which is that appellee seeks therein to answer the questions presented by this appeal. For example, appellee states the asparagus shipped to Rothstein in 1931 was "bunched shipping asparagus", and that "shipping asparagus" and "bunch

asparagus'' are the same thing; that under the agreement at Isleton ''bunched asparagus'' was to be shipped (Brief for Appellee p. 3); that ''bunch grass'' and ''green shipping grass'' as used by the trade are synonymous (App. Br. p. 5); that the number of crates of shipping asparagus produced was 15,161 crates. (App. Br. p. 6.) These statements are not supported by the record, as will be hereafter discussed.

ARGUMENT.

I.

THE STATUTE OF FRAUDS APPLIES TO THE TELEGRAMS. (PLAINTIFF'S EXHIBITS NOS. 2 AND 3.)

Appellee's statement that the statute of frauds does not apply to *growing crops* is incorrect. In *Vulicevich v. Skinner,* 77 Cal. 239 (App. Br. p. 6), the court in making the statement quoted by appellee, was referring to the fact that growing crops were not *real property* within the meaning of the statute of frauds. The quotation from 12 Cal. Jur. page 876 (App. Br. p. 7), relies on *Davis v. McFarlane,* 37 Cal. 636 and *O'Brien v. Ballou,* 116 Cal. 318. These cases hold that growing crops are chattels but are not within the provisions of Section 3440 California Civil Code requiring an immediate delivery and continued change of possession in order for a sale of chattels to be valid as against creditors or purchasers in good faith. That Code Section is not involved herein. California Civil Code Sections 1624 (a) and 1724 (Opening Brief p. 9) requiring contracts for the sale of *goods* of the value of $500

or more to be in writing apply to the alleged contract in the instant proceedings. The word "goods" as used in said Code sections includes *industrial growing crops.* (California Civil Code Section 1796.)

Furthermore, appellee's argument is not applicable in that (1) the alleged contract was for the sale of asparagus to be *shipped* and *was not a sale of growing crops;* and (2) the action is predicated upon a written contract and irrespective of the statute of frauds, the writings relied upon (Plaintiff's Exhibits Nos. 2 and 3), do not constitute a written contract.

II.

THE TWO TELEGRAMS (PLAINTIFF'S EXHIBITS NOS. 2 AND 3) DO NOT CONSTITUTE A SUFFICIENT MEMORANDUM OF THE AGREEMENT OF THE PARTIES TO SATISFY THE REQUIREMENTS OF THE STATUTE OF FRAUDS.

(a) Parol evidence is not admissible to ascertain the identity of the subject matter or the meaning intended by the words used.

Appellee has confused the distinction between introducing parol evidence to explain terms in a contract which are uncertain or ambiguous or to explain the meaning of trade terms and the introduction of parol evidence to ascertain the *intent* with which parties used certain terms. Parol testimony is admissible to show the *ordinary meaning* of the words used and if the words are trade terms to show the meaning of the words in the trade. (California Civil Code, Section 1644; California Code of Civil Procedure, Section 1861.) If the parol testimony disclosed that each of the parties used a different term, parol tes-

timony would not be admissible to show the *intent* with which the parties used their respective terms.

Seymour v. Oelrichs, 156 Cal. 782. (Op. Br. p. 9.)
Wright v. Weeks, 25 N. Y. 153. (Op. Br. p. 27.)

As the undisputed testimony was to the effect that the terms "all asparagus" and "all bunch asparagus" denoted different grades of asparagus (Op. Br. pp. 13-16), it was impossible to ascertain from the writings the *subject matter* of the alleged contract, which is one of the *essential elements* required by the statute of frauds to be contained in the written memorandum. (27 Corpus Juris p. 268.) Furthermore, it does not appear from the face of the telegrams as to what monetary amount would constitute a satisfactory bank guarantee. Therefore, the writings omitted another of the *essential elements* required by the statute of frauds to be in writing, namely, the *terms and conditions* of the alleged contract. (27 Corpus Juris p. 268.)

The citations from 59 A. L. R. page 1423 and 30 A. L. R. page 1167 (App. Br. p. 8), do not support the statement for which they are cited as authority. The courts in said reports held that where an expression relating to price in a contract requires explanation, parol evidence may be admitted so that the court may be in the same position as the parties for the purpose of understanding the agreement. That rule, however, does not mean that if the parties used different prices parol evidence would be admissible to show that they *meant* the same price.

Appellee quotes from *Rohan v. Proctor,* 61 Cal. App. 447 (App. Br. p. 8), for the purpose of showing that parol

evidence is admissible to make terms used certain by showing the prior or contemporaneous understanding of the parties in that regard. The case involved the construction of an agreement to enter into a written lease. An examination thereof discloses that the court first found that the writings contained all of the *essential terms* required by the statute of frauds, and that the parol testimony sought to be introduced was with reference to an uncertainty not required to be in writing, namely, as to the improvements the lessor had agreed to make upon the property prior to the commencement of the lease. The quotation from the case by appellee (App. Br. p. 8) must be read in connection with the facts of the case, the holding of the court being that if the parties had an oral understanding as to the improvements to be made the same could be shown by parol.

Appellee quotes from *Brewer v. Horst & Lachmund,* 127 Cal. 643 (App. Br. p. 9), to show that parol testimony is admissible to connect the *description* used by the parties with the only thing intended. The facts therein disclosed that the parties used the term "Thirteen". The court found by parol evidence that the word "Thirteen" had a particular meaning in the trade, designating a certain picking of hops. The statement therefore by the court relied upon by appellee must be viewed in light of the facts of the case, namely, that the description used by the parties had a definite trade meaning.

The rule quoted in italics by appellee (App. Br. p. 10) is not subject to the interpretation placed thereon by appellee. It is appellee's contention that irrespective of the fact that one party used one term and the other party used

an entirely different term, parol testimony is admissible to show that the parties *intended to use the same term* because of prior relations and dealings had by the parties. In other words, if a party used the word "white" in an offer and the acceptance used the word "black", it is appellee's contention that by parol testimony it could be shown that the parties had only discussed black, and therefore when the word "white" was used in the offer, it meant black and the party accepting knew that the offer meant black, and that was the reason the acceptance used the word "black". If such testimony was admissible, the statute of frauds would become meaningless and a farce. (See *Wright v. Weeks,* 25 N. Y. 153; Op. Br. p. 38.)

Appellee quotes from *Tennant v. Wilde,* 98 Cal. App. 437 (App. Br. p. 10), as authority that parol testimony is admissible to show that the parties understood the language used in the sense contended for. The statement by the court is *preceded* by the following language:

> "If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, *without doing violence to its usual and ordinary import,* or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining." (Italics ours.)

To construe the words "all asparagus" used by appellee in his offer to appellants as meaning "all bunch asparagus" would do violence to the usual and ordinary import of the words used. The same argument would arise if an attempt was made to construe the words "will arrange guaranty" used by appellants as meaning an agreement to arrange a "satisfactory bank guaranty".

The statement that where a written contract is ambiguous or uncertain and where parol evidence as to such facts is disputed, the terms become questions of fact for the jury, has no application herein for the reason that the parol testimony introduced disclosed that the terms used by the parties with reference to the subject matter were not ambiguous or uncertain, but that the terms had different meanings, and also that the term "satisfactory bank guarantee" was too indefinite. Therefore, there was no question of fact for the jury. In the case of *O'Connor v. West Sacramento Co.,* 189 Cal. 7, 18, relied upon by appellee, the court stated:

> "If the facts and circumstances to be considered in the interpretation of the contract are *undisputed,* there is nothing to submit to the jury and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances." (Italics ours.)

The statement by appellee that *Seymour v. Oelrichs,* 156 Cal. 782, lacks point overlooks the rule of the case, namely, that the *intention of the parties cannot be shown by parol.* The case is a leading authority in this state upon that point.

(b) The telegrams (Plaintiff's Exhibits 2 and 3) do not show an absolute and unqualified acceptance by appellants of the offer of appellee.

To show that appellants' telegram (Plaintiff's Exhibit No. 3) was an absolute acceptance of appellee's offer (Plaintiff's Exhibit No. 2) appellee contends that the phrase "all asparagus shipped" as used by appellee in his offer (Plaintiff's Exhibit No. 3) means and *meant to the parties* all shipping asparagus, and that shipping

asparagus and bunch asparagus are one and the same thing. (App. Br. p. 11.) To support this statement appellee contends (1) that shipping asparagus and bunch asparagus are identical terms in the trade; (2) that prior to the sending of the telegrams appellee told appellants that he would ship the same asparagus as shipped through Garin, which was bunch-shipping asparagus; and (3) that as far as appellee knew only bunch asparagus was shipped east. (App. Br. pp. 11, 12.)

The record does not support the statement by appellee. There was not one iota of testimony to the effect that "all asparagus shipped" meant "shipping asparagus" in the trade, and it is apparent from an examination of the phrases that they do not bear the construction placed thereon by appellee. The word "shipping" before the word "asparagus" is descriptive and denotes a particular type of asparagus recognized by the trade as suitable for shipping and can be either *loose pack or bunch pack.* The phrase "all asparagus shipped" on the other hand denoted all of the asparagus that the shipper may see fit to ship. Furthermore. the term "shipping asparagus" and "bunch asparagus" do not have the same meaning. Appellee's own testimony was that "shipping asparagus and bunch asparagus is *practically* the same thing as far as the trade is concerned". (Tr. p. 35.) M. H. Rothstein testified that in the custom and usage of the asparagus trade there is a difference between the terms "bunch asparagus" and "all shipping asparagus". (Tr. p. 86.) There was no testimony to the contrary, and appellee's own testimony disclosed that there is some difference between the terms.

Appellee's statement that as far as he knew no other asparagus was shipped east except "bunch asparagus" is not supported by the record. Appellee's record of his asparagus shipped east (Plaintiff's Exhibit No. 8) discloses that he shipped both bunch and loose asparagus to the east coast. For example, he shipped 220 crates of loose asparagus to Buffalo. (Tr. p. 147.) In other words, *appellee's own records disclose that shipping asparagus can be either bunch pack or loose pack.* This was supported by the testimony of Garin to the effect that there is a loose pack as well as a bunch pack of asparagus, and six grades of bunch pack. (Tr. p. 49.) Therefore, even if conceded that appellee meant "all shipping asparagus" in the offer contained in his telegram (Plaintiff's Exhibit No. 2), appellants only offered to purchase *one particular type of shipping asparagus, namely, the bunch asparagus.* The acceptance was therefore not an unqualified acceptance of plaintiff's offer.

Appellee's statement that Garin testified that green merchantable shipping asparagus would be the same as bunch asparagus omits part of the statement of the witness, namely, that green merchantable shipping asparagus would be the same as bunch asparagus *if it was up to grade.* (Tr. p. 49.)

The testimony of appellee that he told Rothstein prior to the sending of the telegrams that he would ship the same asparagus as shipped through Garin, which was bunch asparagus, is not only incorrect but has no bearing upon the meaning of the terms used by the parties, as the Garin contract (Defendants' Exhibit No. 5, Tr. p. 86) was in no manner referred to in any of the writings and

parol testimony is not admissible to connect writings. (Op. Br. pp. 29, 30.) Furthermore, the Garin contract called for "green merchantable shipping asparagus", and this is not the same as "bunch asparagus". Markham, a witness called by appellants, testified that the Garin contract called for all straight suitable asparagus, without broken tips, suitable for shipping and it was *not* bunch asparagus. (Tr. p. 63.)

Appellee's statement that appellants' assignment of error No. 34 admits that appellee's offer was to sell "all shipping asparagus" is an attempt by appellee to find solace in an inadvertent expression. No other place in the numerous assignments of error does this expression appear.

Appellee's novel contention that the statement in appellants' telegram (Plaintiff's Exhibit No. 3) reading "meanwhile figuring deal confirmed", showed an unqualified acceptance of appellee's offer is worthy of no consideration. In *Izard v. Connecticut Fire Insurance Co.* (Supreme Ct. Ark.), 194 S. W. 1032, the court held in face of the following statement in the writing "Confirmatory of our conversation in Memphis last Friday", etc., that the writing was insufficient within the meaning of the statute of frauds.

Appellee also contends that the phrase "will arrange guarantee" may be reasonably construed as arranging the guarantee demanded, namely, a "satisfactory bank guarantee". (App. Br. p. 13.) Appellee's construction of the two terms does not answer the query, did the appellants make an unqualified acceptance of appellee's offer to sell the asparagus provided a satisfactory bank guar-

antee was given? Where in appellants' telegram did they agree to provide a *bank* guarantee? As a matter of fact, appellants offered a *bond* as a guarantee for faithful performance of the contract. (Tr. p. 33.) The authorities cited by appellee to the effect that uncertainties and ambiguities are to be interpreted most strongly against the one who caused the uncertainty, have no bearing upon the question involved herein in so far as the guarantee is concerned, for the reason that the parties used definite, certain and unambiguous terms. Appellee requested a "satisfactory bank guarantee" and appellants offered to arrange a guarantee without specifying the nature thereof. Furthermore, the term "satisfactory bank guarantee" is too uncertain to be capable of acceptance or to be aided by parol testimony. *Winburgh v. Gay,* 27 Cal. App. 603. (Op. Br. p. 19.)

(c) There was no meeting of the minds of the parties as to the subject matter of the contract.

In reply to the question propounded by appellants asking where in either of the telegrams (Plaintiff's Exhibits 2 and 3) it appears how much in dollars and cents would constitute a "satisfactory bank guarantee", appellee answers that there was an estimate by the parties of 20,000 crates and furthermore that the matter was not one for subsequent settlement or agreement as the agreement to furnish a satisfactory bank guarantee meant one satisfactory to the appellee. (App. Br. p. 14.)

The estimate of 20,000 crates was made *after* the telegrams had been sent. (Tr. pp. 23, 112.) Also, appellee did not demand in his telegram a guarantee satisfactory to him and in no manner could the reply telegram of

appellants be interpreted as consenting to furnish a guarantee satisfactory to appellee as the sole judge as to the reasonableness thereof. In the absence of an understanding that the guarantee is to be satisfactory to one particular party, a stipulation in a contract to perform to the satisfaction of the parties calls merely for such performance as should be satisfactory to a reasonable person. *Scott Co., Inc. v. Rolkin,* 133 Cal. App. 209, 212. All of the authorities cited by appellee deal with situations wherein one party has agreed to perform to the satisfaction of the other party. Furthermore, if appellee be correct in his statement that appellee was to be the sole judge of the reasonableness of the bank guarantee, the failure of appellants to have furnished a bank guarantee satisfactory to appellee would not have given rise to a cause of action by appellee for breach of contract. 13 *Corpus Juris,* page 676.

The fallacy of appellee's entire argument is best illustrated by his statement that the amount of asparagus sold was not open to future agreement, that it was definitely all bunch or shipping asparagus *grown and harvested upon Brannan Island,* for the 1934 green shipping asparagus season which ended April 10, 1934. (App. Br. p. 16.) Nowhere in either telegram do the words "grown" or "Brannan Island" appear, and to construe the offer to *ship* asparagus to mean to sell asparagus *growing on Brannan Island* is neither giving the term used its ordinary meaning or applying thereto a trade term, and such an interpretation of the words used amounts to an attempt to vary the terms of a written instrument. The authorities cited by appellee (App. Br.

pp. 16-17) are subject to the same objection as previously discussed, namely, the authorities deal with situations wherein a description used is uncertain or ambiguous.

Appellee states that neither *Winburgh v. Gay,* 27 Cal. App. 603 (Op. Br. p. 19), nor *Baird Investment Co. v. Harris,* 209 Fed. 291 (Op. Br. p. 21), are in point, as both involve terms and provisions left open to future agreement of the parties. The two telegrams (Plaintiff's Exhibits 2 and 3) also involved terms left open to future agreement of the parties.

The rule of *Baird Investment Co. v. Harris* (supra), to the effect that if any of the terms, no matter how unimportant they may seem, are left open to be settled by future conferences then there is no complete agreement within the Statute of Frauds, is squarely applicable in this proceeding. *The undisputed testimony disclosed that it was necessary for the parties to meet* after the telegrams had been sent in order to determine approximately how much asparagus would be shipped so as to base thereon an estimate as to what amount of guarantee should be furnished. (Tr. pp. 22, 23, 112.) The testimony showed further that after estimating the amount of asparagus to be shipped the parties could not agree upon either the amount nor the type of guarantee to be furnished. (Tr. pp. 23, 113.) Such testimony unequivocably refutes appellee's position that no essentials were left open for future agreement in the case at bar.

Appellee also attempts to distinguish *Hamby v. Truitt,* 81 S. E. 593, upon the ground that the missing element was the weight of the bales referred to in the alleged contract and that no evidence was *introduced* showing

custom or usage as to weight. This analysis by appellee evidences a failure to properly understand the case. The case was decided on demurrer. Plaintiff sought to amend to set forth an oral agreement as to how much the bales sold were to weigh and also the grade of the cotton in the bales. The court refused to permit the amendment and stated that this would have extended the written agreement by the adoption of a parol agreement.

In the instant proceedings appellee distorts the writings (Plaintiff's Exhibits 2 and 3) by contending (1) that "all shipping asparagus" means "bunch asparagus"; (2) that when the offer used the words "all asparagus shipped" the offer meant all "bunch asparagus"; (3) that appellants agreed to provide a "satisfactory bank guarantee"; (4) that appellee was to be the sole judge as to the reasonableness of the guarantee; (5) that the satisfactory bank guarantee was to cover a shipment of approximately 20,000 crates of bunch or shipping asparagus; and (6) that appellants agreed to purchase all bunch or shipping asparagus grown or harvested on Brannan Island.

All of the above contentions by appellee incorrectly interpret the writings; do not give to the words used either their ordinary meaning or trade definition, and completely vary the terms of the writings.

The crux of the entire question regarding the parol testimony introduced in evidence as to the *intent* with which the parties used and understood the terms in their respective telegrams, objected to by appellants and exception noted (Tr. pp. 25-30), is evidenced by appellee's statement that parol testimony is admissible to show the *meaning intended* by the parties to words used in writ-

ings which are *uncertain.* (App. Br. p. 19.) As heretofore shown, the terms "all asparagus shipped" and "all bunch asparagus" had definite trade meanings each term denoting a *different* grade of asparagus. The terms were not *uncertain.* Parol testimony was not admissible to show that when plaintiff used the term "all asparagus shipped", he meant "all bunch asparagus".

> "If the parties have used abbreviations or technical terms, or *terms of trade,* evidence may be given, by parol, to show what meaning such abbreviations and terms had acquired, by usage or custom, *but not in what sense the parties used them.*" (Italics ours.)
> *Wright v. Weeks,* 25 N. Y. 153, 160.

The case of *American Sugar Refining Co. v. Colvin,* 286 Fed. 685, cited by appellee (App. Br. p. 19), dealt solely with the right to introduce parol testimony to show the *meaning of technical words used.*

Furthermore, as heretofore shown, it was impossible to ascertain from the face of the telegrams what monetary amount would constitute a "satisfactory bank guarantee"; that it was necessary for the parties to meet *after* the telegrams were sent in order to estimate the amount of asparagus to be shipped and thereby estimate the amount of guarantee that should be provided. The term "satisfactory bank guarantee" therefore could not be understood without recourse to parol evidence to show the intention of the parties. In *Seymour v. Oelrichs,* 156 Cal. 782, 787, the court stated:

> "To satisfy the statute of frauds a memorandum 'must contain the essential terms of the contract expressed with such degree of certainty that it may be understood *without recourse to parol evidence to show*

the intention of the parties'. (5 Browne on Statute of Frauds, Sec. 371.)'' (Italics ours.)

Furthermore, appellants did not agree to provide a *bank* guarantee. (Plaintiff's Exhibit No. 3.) At the meeting held after the transmission of the telegrams, appellants offered to post a *bond.*

(d) The telegrams were not mutually binding upon the parties.

In response to the question propounded by appellants as to how much asparagus appellee was bound to *ship,* appellee replies that he was bound to ship all the shipping or bunch asparagus *grown on Brannan Island.* Appellants now ask, where in either telegram do the words ''grown'' or ''Brannan Island'' appear? Appellee attempts to distinguish the case of *Hazelhurst v. Mercantile etc. Co.,* 166 Fed. 191 (Op. Br. p. 32), by stating that the defendant therein agreed to purchase all ties plaintiff could produce and *ship,* which is quite different than selling a *growing* crop of produce, the amount of which can be reduced to a certainty. (App. Br. p. 21.) Appellee again distorts the words used in appellee's telegram, namely, to sell all asparagus *shipped,* by stating that the alleged contract was to sell all asparagus *grown.*

Appellee continues to assume the erroneous position that where there is a prior oral understanding it may be resorted to so as to identify the subject matter referred to in the written memorandum. The authorities cited by appellee do not support this statement. In *Brewer v. Horst & Lachmund,* 127 Cal. 643, parol testimony was introduced to explain a trade term. In *Diffendrof v.*

Pilcher, 116 Cal. App. 27, the court stated the general rule that in the construction of executory contracts of sale of *real property* the courts have been most liberal to give effect to the intention of the parties as to descriptions. *Preble v. Abrahams,* 88 Cal. 245, also involved the sale of *real property.* In *Rohan v. Proctor,* 61 Cal. App. 447, the parol testimony was not with reference to an essential term required under the statute to be in writing.

Appellee refers to the last cited case as showing that the court indicated that in the absence of a prior oral understanding, the memorandum would have come within the bar of the Statute of Frauds. The statement of the court must be read in light of the facts. The court first found that it was not necessary for an agreement to enter into a lease to fix the time of the commencement of the lease; that it was only necessary to fix the term of the lease; that if the agreement called for repairs, parol testimony would be admissible to show what the agreement of the parties was with reference to the repairs to be done, and that as a matter of law the lease would be deemed to commence from the time of the completion of the repairs. If, however, there was no understanding as to the repairs to be done, it was impossible to fix a time for the lease to commence, and therefore the written agreement would be obnoxious to the State of Frauds. In other words, unless there was a parol understanding as to the repairs to be done, which was not required under the Statute of Frauds to be in writing, the court could not determine when the lease was to run and therefore the memorandum would not be sufficient to constitute a contract.

The correct rule in this regard is stated in *Lewis v. Elliott Bay Logging Co.* (Supreme Court of Washington), 191 Pac. 803, as follows:

> "* * * We have not overlooked the rule that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown for the purpose of applying the contract to the subject-matter, *but this rule does not go to the extent of permitting an essential term of the memorandum to be shown by oral testimony.*" (Italics ours.)

III.

APPELLANTS ARE NOT ESTOPPED TO DENY THAT THE TELEGRAMS (PLAINTIFF'S EXHIBITS NOS. 2 AND 3) CONSTITUTED A BINDING CONTRACT.

The statement by appellee that appellants' telegram was an absolute and unqualified acceptance of the offer contained in appellee's telegram assumes to answer one of the questions presented by this appeal, namely, whether or not the two telegrams constituted a written contract. The statement in appellants' telegram referring to the confirming of the deal is of no importance. See *Izard v. Connecticut Fire Insurance Co.,* supra. Appellants also stated in their telegram "draw up contract my arrival" thereby offsetting the reference to the confirming of the deal and showing that no contract had in fact been entered into.

IV.

A VARIANCE EXISTS BETWEEN THE PROOF AND THE PLEADINGS AND THE ISSUE RAISED HAS BEEN SAVED FOR REVIEW BY THIS COURT.

Objection was made to the introduction in evidence of the telegram from appellants (Plaintiff's Exhibit No. 3) upon the ground that it did not conform to the allegations set forth in the complaint, and an exception was taken to the overruling of the objection. (Tr. pp. 20-21.) An assignment of error was based upon the fact that the evidence did not disclose a contract as alleged in appellee's complaint. (Assignment of Error No. 4, Tr. p. 213.)

It is well recognized that state practice is followed in the federal courts in matters of variance and conformity of proof to allegations in the complaint.

Longsdorf Cyc. of Fed. Proc., Vol. 2, p. 599.

The California law regarding the urging of variance between the pleadings and proof differs from the law of the State of Illinois, relied upon by the case of *Illinois Car etc. Co. v. Linstroth,* 112 Fed. 737, cited by appellee. In *Thompson v. M. K. & T. Oil Co.,* 5 Cal. App. (2d) 117, 121, the court stated:

> "It is well settled that if a defendant desires to take advantage of a variance, it must be done either by objecting to the admission of the testimony or by motion for a non-suit, * * *"

In *California S. F. Corporation v. J. D. Millar Realty Co.,* 118 Cal. App. 185, 190, the court stated:

> "Moreover, the objection to the introduction of the note in evidence was placed upon the sole ground that 'there is no proof of delivery'. The objection

> was not made upon the ground of variance between the allegation of transfer and the proof thereof, *nor even upon the ground of incompetency.* The note was properly admitted in evidence.'' (Italics ours.)

As heretofore stated, objection was made by appellants to the introduction of appellants' telegrams (Plaintiff's Exhibit No. 3) upon the ground that it did not conform to the allegations in the complaint. (Tr. pp. 20-21.) In this regard, the court's attention is respectfully called to the various questions asked by the trial judge at the time of the making of the objection, and the replies given thereto by counsel for appellants. (Tr. p. 20.) At the conclusion of the trial, appellants moved to strike certain testimony given upon the ground that there was a *variance* between the pleadings and the proof. (Tr. p. 173.) Also, a motion for a directed verdict was made upon the ground that the evidence was insufficient to show a contract in writing as alleged in appellee's complaint. (Tr. p. 173.)

It is respectfully submitted that appellants sufficiently urged the variance between the pleadings and the proof to apprise appellee of the discrepancy. The statement by appellee that if a variance did exist it was immaterial and would not prejudice the appellants is not well taken for the reason, as stated by appellants (Op. Br. p. 35), if the complaint had used the word ''shipped'' instead of the word ''grown'', the complaint would have failed to state a cause of action, furthermore for the same reason appellee could not have amended his complaint during the course of the trial to conform with the evidence. The variance was therefore material and prejudicial to ap-

pellants. Even if the variance could have been cured by amendment, it is still fatal to the validity of the judgment. *Fernandez v. Western Fuse etc.,* 34 Cal. App. 420, 422.

V.

APPELLANTS' MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

As there was no conflict in the testimony with reference to the telegrams (Plaintiff's Exhibits 2 and 3), there was no issue of fact for the jury, and therefore appellants' motion for a directed verdict should have been granted.

The parol testimony as to the grade of asparagus referred to in the two telegrams unequivocably showed that each of the parties referred to a different grade of asparagus. The terms used were not ambiguous or uncertain, and in the usage of the trade each term had a definite meaning. The parol testimony introduced as to the meaning of the words "satisfactory bank guarantee" showed that it was impossible to arrange such a guarantee without the parties first agreeing as to the approximate amount of asparagus to be shipped. Nowhere on the face of the telegrams was the amount of asparagus to be shipped indicated. The evidence showed that no discussion as to the amount of the guarantee was had by the parties until *after* the telegrams were sent. (Tr. pp. 23, 112.) The term "satisfactory bank guarantee" was also too uncertain to form a basis for a meeting of the minds. *Winburgh v. Gay,* 26 Cal. App. 603. Furthermore, appellants did not agree to provide a "satisfactory bank

guarantee'' but merely agreed to arrange a ''guarantee''. (Plaintiff's Exhibit No. 3.) The evidence showed that a guarantee in connection with the produce trade could be arranged by other means than a bank guarantee. (Tr. pp. 46, 47.) The telegrams (Plaintiff's Exhibits No. 2 and 3) also disclosed a variance between the pleadings (Tr. p. 3) and the proof.

The case of *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 18, from which appellee quotes, must be read in light of the sentence which prefaced the quotation, which reads as follows:

> ''We will not undertake to analyze these cases, for the reason that the fundamental principle involved is elementary, and is recognized in these decisions, namely, *that the construction of a contract is always a matter of law for the court,* no matter how ambiguous or uncertain or difficult its terms and that the jury can only assist the court by determining disputed questions of fact.'' (Italics ours.)

The court also stated:

> ''But in no case can the proper construction of the contract be left to a jury.''

There being no disputed questions of fact involved, it was incumbent upon the court to grant the motion for a directed verdict.

VI.

THE DAMAGES AWARDED APPELLEE BY THE JURY WERE NOT SUFFICIENTLY PROVED BY THE EVIDENCE.

Before commencing the discussion of the question of damages, it is necessary to point out that the appellee

throughout his brief has referred to Plaintiff's Exhibit No. 8 as his "sales account". This should not be confused with the "account sales" ordinarily rendered to shippers by consignees of produce. Plaintiff's Exhibit No. 8 was a pencil memorandum prepared by appellee from the account sales rendered to him. It contained a summary of some of the items set forth in the account sales. The summary, however, omitted many material items contained in the account sales as will be hereinafter discussed.

Appellants' assignment of error relating to the introduction in evidence of Plaintiff's Exhibit No. 8 (Assignment of Error No. 8, Tr. p. 214; No. 37, Tr. p. 226; No. 14, Tr. p. 215), and Assignment of Error No. 15 (Tr. p. 216) relating to Plaintiff's Exhibit No. 9 do not violate Rules 11 and 24 of this court. Appellants' brief complies in detail with the requirements of Rule 24 which pertains to the form and contents of brief. Appellants' assignments of error were filed prior to the amendment of Rule 11 on February 1, 1937. However, the grounds of error set forth in said assignments were urged in the trial court as objection to the introduction of said exhibits in evidence and exceptions noted. (Tr. pp. 141, 161, 154, 167.)

(a) Appellee's memoranda of sales (Plaintiffs' Exhibit No. 8) were not sufficient proof of the amounts received by appellee from the sale or disposition of the asparagus and did not constitute a permanent record of original entry.

Objection was made to the sufficiency of the evidence that the railroad claims did not exceed $100.00. This was on the ground that there was no foundation laid, there being no showing as to the volume of business done

in the particular year referred to upon which appellee based his computation. (Tr. p. 166.)

Appellants did not proceed upon the theory that appellee's memoranda of sales (Plaintiff's Exhibit No. 8) did not reflect the entire amount received from the *sales* of asparagus. (App. Br. p. 29.) At the trial, after appellee had testified that the memoranda (Plaintiff's Exhibit No. 8) did not show the entire money received from the sale, *disposition* or consignment of the asparagus, appellants moved to strike the exhibit from the record upon the ground that it was incomplete. (Tr. p. 161.) Objection was also made to the introduction in evidence of Plaintiff's Exhibit No. 8 upon the ground that it was hearsay, incompetent, irrelevant, not the best evidence, and was not a book of permanent record. (Tr. p. 141.)

The measure of damages for the alleged breach of a contract in the State of California is fixed by Section 1784 of the Civil Code as being the difference between the contract price and the market or current price at the time when the goods ought to have been accepted. The memoranda (Plaintiff's Exhibit No. 8) merely showed the alleged *net* amount received by appellee after the agents had deducted freight, commissions, and sometimes cartage and precooling. Said Plaintiff's Exhibit No. 8 did not show the price for which the asparagus was sold, from which appellants could have ascertained whether the price received was the *market or current price*. In this connection, appellee alleged in his complaint that the market or current price for the goods at the time when the defendants should have accepted the same was the sum of $22,547.85. However, the evidence discloses that

said sum represented an alleged *net* amount received by appellee and not the market price for which the asparagus was sold. (Tr. pp. 155, 156.) Therefore, appellee's statement that it was not necessary that the memoranda of sales (Plaintiff's Exhibit No. 8) should set forth the *gross* sales price or the specified grade of asparagus sold is incorrect.

Appellee states that at the trial appellants did not contend that the *net amount* claimed to have been received by appellee from the sale of the asparagus was not the correct net. (App. Br. p. 29.) This statement ignores the position taken by appellants during the entire trial that the *net* amount received by appellee was not the proper basis upon which to fix damages; that appellee must first show the price for which the asparagus was *sold on the open market,* and that after showing the market price appellee could then deduct therefrom the various charges properly incurred by him in connection therewith, and thus predicate his damages upon the net received. Appellee chose, however, to merely introduce evidence by Plaintiff's Exhibit No. 8 that he had sold 15,161 crates of bunch asparagus, and that he had received therefor the net sum of $22,547.85. When confronted with the fact that certain refunds had been received on claims against railroads which were not ascertainable from Plaintiff's Exhibit No. 8, appellee sought to cover this omission by testifying over the objection and exception of appellants that the railroad claims had never in previous years exceeded $100.00. (Tr. p. 166.)

The authorities cited by appellee (App. Br. pp. 30, 31) do not support his contention that Plaintiff's Exhibit No.

8 was a book of *original entry*. *Landis v. Turner,* 14 Cal. 573 (App. Br. p. 30), is direct authority in support of appellants' position. In that case the plaintiff testified that the charges were first entered on a slate and then transferred to the book which he sought to introduce in evidence. The court stated that the entries on the slate were mere memoranda and not intended to be permanent. In the case at bar Plaintiff's Exhibit No. 8, consisting of pencil entries made by appellee from the account sales rendered by the agents in the east, which pencil entries were thereafter turned over to appellee's bookkeeper to enable him to make ink entries in a permanent book not produced in court, constituted mere memoranda.

Appellee's statement that in *Idol v. S. F. Construction Co.,* 1 Cal. App. 92, the court held that entries from way-bills were original entries, is incorrect. The plaintiff therein testified that until September 17th he entered in the book upon which he relied to prove the number of men hauled, the names of the men sent out each day, but that after that date he *copied the names in the book from the way-bills,* that *up to* September 17th he was absolutely certain that the book contained a correct statement of the name of every man hauled and that *after* that date the book contained a correct account of every man on the way-bills. The court stated at page 94:

> "The book was the book of original entry *up to* September 17th, the entries made therein by the plaintiff at the time of the transaction, and was properly introduced in evidence for the purpose of showing the number of men sent out to that date. *But after September 17th the waybills constituted the 'original entry', and they are not the book to which their contents were transcribed.*" (Italics ours.)

The cases of *Storm & Butts v. Lipscomb,* 117 Cal. App. 6, and *Patrick v. Tetzlaff,* 46 Cal. App. 243, are not in point as in the instant case appellee testified that after making the pencilled memoranda of sales (Plaintiff's Exhibit No. 8), he turned the memoranda over to his bookkeeper to enter the cash received in ink in a cash book and that the cash book correctly showed all moneys received from the disposition of the asparagus. (Tr. pp. 136-139.) Appellee admitted that Plaintiff's Exhibit No. 8 did not show all the money received from the sale, disposition or consignment of the asparagus. (Tr. p. 161.) The cash book *not* produced in court was appellee's permanent record of moneys received. Furthermore, appellee still had in his possession the *original* account sales received from the various agents which he did not produce. (Tr. pp. 137-138.)

In *Patrick v. Tetzlaff,* supra, time cards of various workmen were introduced in evidence after the bookkeeper had identified the signatures of the workmen. It is apparent that the court was correct in permitting the introduction of the time cards. The court stated that it would be impossible in a large plant to have all of the workmen testify. The case presents a different situation than shown by the instant proceedings. *The account sales of the various agents in the east are analogous to time cards.* The account sales, according to the testimony of appellee, showed what the asparagus was sold for and also showed the various charges deducted by the agents from the gross amount received from the sale of the asparagus. These account sales under the authorities cited by appellee could have been introduced in evidence as

original records. Furthermore, if Plaintiff's Exhibit No. 8 had been an exact copy of the account sales showing the price for which the asparagus was sold on the market and the amounts of the various charges deducted therefrom, it may have been admissible under Section 1947 of the *Code of Civil Procedure,* cited by appellee, as being a copy of an entry repeated in the regular course of business. However, Plaintiff's Exhibit No. 8 failed to disclose the most important fact shown on the account sales of the various agents, a fact which appellee under the law of the State of California and by his pleadings was bound to prove, namely, the market price for which the asparagus was sold. Plaintiff's Exhibit No. 8 was therefore not a sufficient copy of the account sales.

In *Storm & Butts v. Lipscomb,* supra, relied upon by appellee, the time sheets were prepared from memoranda prepared by the foreman who had turned the memoranda over to the timekeeper, who made the entries on the time sheets. *The memoranda were not preserved.* The time sheets were such as were ordinarily kept by construction companies. The court held the time sheets admissible in evidence. The distinction between the case cited and the case at bar is that Plaintiff's Exhibit No. 8 *does not purport* to be a copy of the account sales, and as already stated, does not show the most important elements, namely, the amount for which the asparagus was sold on the open market and the amount and nature of the various charges to be deducted therefrom. Furthermore, the account sales of the various agents were still in the possession of appellee. What is more, Plaintiff's Exhibit No. 8 did not even purport to be a permanent record of all moneys

received by appellee. The best evidence of this fact is the cash book kept in ink by appellee's bookkeeper and not produced in court.

Appellee contends that the ledger introduced in evidence in *Sugarloaf etc. v. Skewes,* 47 Cal. App. 470, cannot be differentiated from the memoranda of sales. (Plaintiff's Exhibit No. 8, App. Br. p. 33.) Appellee overlooks the fact that *in the Sugarloaf case the sales accounts rendered by the agents were introduced in evidence along with the ledger,* that objection had been made to the introduction of that part of the ledger referring to the account sales, and the court held that if there was any error in the reception of the ledger account as covering the items of the account sales, the error was cured by the introduction of the account sales themselves. The case cited supports the position taken by appellants at the time of the trial and on this appeal, that Plaintiff's Exhibit No. 8 was not admissible in evidence as proof of damages suffered in the absence of the original account sales, particularly in view of the fact that said exhibit did not even purport to be an exact copy of the account sales, omitted the most important portions thereof, and the original account sales were still in the possession of appellee.

Appellee's statement that he checked the *gross* sales prices of the asparagus shown in his agents' sales reports against the daily report of asparagus sales shown in the "Federal Market News Service" (Plaintiff's Exhibit No. 9), and found the prices his agents secured were in line with those shown by the market service, was not only appellee's conclusion, to which objection and exception was taken (Tr. pp. 151, 152), but shows the further sound-

ness of appellants' position that without the *original sales accounts,* appellee failed to prove his damages. If the original sales accounts had been produced showing the *gross* sales prices, they could have been compared with the *gross* sales prices shown in the Federal Market Service (Plaintiff's Exhibit No. 9) and by comparing the said prices, it could have been ascertained readily whether or not appellee's asparagus had been sold for the market or current price. There was no manner by which the said market news service reports (Plaintiff's Exhibit No. 9) could be compared with Plaintiff's Exhibit No. 8.

(b) Appellee's memoranda of sales (Plaintiff's Exhibit No. 8) were not admissible in evidence as proof of its contents as an itemized summary by express statutory permission.

Plaintiff's Exhibit No. 8 was not properly introduced in evidence under Section 1855 of the Code of Civil Procedure of the State of California as being a summary of the account sales, which could not have been examined in court without great loss of time, for the reason that in the summary appellee omitted to show the *gross* sales price which was the most important item shown on the account sales rendered by the agents, and furthermore it failed to show the various charges deducted from the gross sales price received.

Appellee infers that appellants should have made a demand for the original account sales. This is manifestly not correct. The burden of proving damages was upon the appellee, the plaintiff below. Appellants objected to the introduction of Plaintiff's Exhibit No. 8 upon the numerous grounds heretofore set forth and this placed appellee upon notice that the original account sales must be produced in court.

The case of *Campbell v. Rice,* 22 Cal. App. 734, 736 (Op. Br. p. 57), is of significant importance by way of reply to appellee. The court stated:

> "Not only was this copy of the bill of particulars not the best evidence, but no necessity existed for its introduction, *for it conclusively appears that the document was transcribed from order sheets, payrolls, and other data constituting a book of original entry * * * in the possession of plaintiff and which he might have produced, thus giving defendant and the court an opportunity to examine it, in order to determine its integrity and correctness* and giving to plaintiff an opportunity to explain any errors or discrepancies therein affecting its weight as evidence. *We are referred to no authority, and we know of none, holding that a party to an action may copy a book of original entry in his possession, withhold the original and prove his case by introducing such copy in evidence,* while, on the contrary, numerous authorities hold such ruling to be error." (Italics ours.)

(c) There was no competent evidence in the record showing the grade and market price of the asparagus sold by appellee's agents.

As heretofore stated by appellants (Op. Br. p. 60), assuming that both Plaintiff's Exhibits Nos. 8 and 9 were properly admitted in evidence, appellee failed to prove his alleged damages in that the exhibits could not be compared or reconciled to determine whether appellee's asparagus was sold for the market or current price, in that the Federal Market News Service (Plaintiff's Exhibit No. 9) disclosed the *gross* prices for which different grades of bunch asparagus were sold on various eastern markets. The memoranda of sales (Plaintiff's Exhibit No.

8) on the other hand, did not disclose either the grade of bunch asparagus shipped by appellee or the *gross amount* received therefor on the market. Appellee therefore failed to sustain the allegation in his complaint that the market or current price for the asparagus, at the time when the same ought to have been accepted by appellants, was $22,547.85. Appellee's testimony disclosed that the sum was the amount received by him from sales after the deduction of certain charges which were not shown. It did not represent the market price. Appellee even concedes that the said amount did not represent his entire receipts, he having omitted to give credit for the amount of the refunds actually received by him from railroad claims. (Tr. p. 161.) Appellee was unable to testify as to the amount of such refunds. (Tr. p. 164.)

There was absolutely no testimony whatsoever from which the court, the jury, or any other person, could have determined whether the appellee's asparagus was sold for the market or current price. Without this proof appellee could not sustain his damages in accordance with the law of the State of California. Section 1784, *Civil Code.*

CONCLUSION.

It is respectfully submitted that by reason of the fact that the two telegrams relied upon by appellee did not constitute a contract, and for the further reason that appellee failed to sustain his burden of proving damages, the judgment of the United States District Court for the Northern District of California should be reversed, and a judgment

ordered entered in favor of the appellants, the defendants below.

Dated, San Francisco,
July 30, 1937.

Respectfully submitted,
TORREGANO & STARK,
By ERNEST J. TORREGANO,
Attorneys for Appellants.

M. C. SYMONDS,
Of Counsel.

No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Subject Index

Table of Authorities Cited

Cases

Codes

Texts

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Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee, George N. Edwards, as receiver in equity of Golden State Asparagus Company, a corporation, respectfully requests the court to grant him a rehearing in the above entitled appeal, wherein this court reversed and remanded the judgment of the court below. Appellee with all due respect to the

learned court is firm in the belief that the court has not given full or adequate consideration to the issues adjudged, and that a careful reconsideration of the facts and the law would not only warrant a rehearing but a reversal of the position taken by the court.

No attempt has been made in the opinion to determine issues bearing directly upon the sufficiency of the telegrams as a memorandum required by the Statute of Frauds; nor has the court attempted to distinguish any of the authorities submitted by appellee, which in his opinion supports the judgment upon the issues considered by the court. Appellee believes that there has been a misapprehension of the facts and the law, and in certain instances an invasion of the province of the jury by the court.

For convenience sake we shall submit for reconsideration the issues treated in the opinion under proper headings and sub-headings.

I.

WHERE A CONFLICT OF THE EVIDENCE EXISTS, OR WHERE NO CONFLICT EXISTS AND INFERENCES FAIRLY DEDUCTIBLE THEREFROM ARE SUCH THAT DIFFERENT CONCLUSIONS MAY BE RATIONALLY DRAWN THE CONCLUSION DRAWN BY THE JURY WILL NOT BE DISTURBED IN THE APPELLATE COURT.

Michelin Tire Co. v. Coleman, Bentel Co., 179 Cal. 598;

Vaughn v. Bixby, 24 Cal. App. 641;

Hoelker v. American Press, (Mo.) 296 S. W. 1008;

Illinois Power and Light Co. v. Hurley, 49 Fed. (2d) 681;

The judgment based upon a jury verdict will not be disturbed if there is substantial evidence in support of the judgment.

Chicago B. & Q. R. Co. v. Kelley, 74 Fed. (2d) 80, 82.

The rules above announced with relation to the evidence appear to have been overlooked by this court. Bearing these rules in mind let us turn to the evidence.

II.

THE COURT ERRED IN HOLDING THAT THE EVIDENCE DID NOT SUPPORT THE JUDGMENT OF THE LOWER COURT.

The evidence introduced is plain to the effect that the parties thoroughly understood each other and as thoroughly believed themselves to be bound by the telegrams as a contract. A subsequent meeting at the office of Mr. Dinkelspiel was for the purpose of securing a satisfactory bank guaranty from Rothstein and of preparing a formal contract merely as a convenient memorial. In no wise did the parties leave open to future agreement or settlement any elements of the contract.

If the parties intended to be bound by the telegrams, and said telegrams in the light of the previous negotiations and understanding at Isleton constitute a sufficient memorandum under the Statute of Frauds, then the fact that a formal contract was to be drawn up

is of no consequence since neither party may escape the binding force of the telegrams by the failure or refusal to reduce them to a formal contract.

See

United States v. Carlin Construction Co., 224 Fed. 859;

Nash v. Kreling, 6 Cal. Unrep. Cas. 238.

Thus, in 27 *Corpus Juris* 256, Section 305-B-1 it was said:

> "The statutes may be satisfied by informal memoranda containing sufficient evidence of the terms of a concluded contract and properly executed, even though the parties intend subsequently to embody the same terms in a formal contract, and even though they refer in the memoranda to a formal agreement to be thereafter prepared and executed."

That the parties understood each other and agreed to be bound by the telegrams is clearly shown by the evidence. The answering telegram of Rothstein states:

> *"Meanwhile considering deal confirmed,"*

and by his statement on his arrival at the office of Mr. Dinkelspiel on February 19th, where he said:

> *"What are we here for? We got a deal. What are we going to discuss?"*
>
> (R. 17, 18, 112.)

This declaration of Rothstein seems to have been overlooked by the court, and which declaration Rothstein did not deny.

Particularly when considered together these two expressions or declarations contain no possible equivocation. They portray a definite state of mind, an understanding as to the contract agreed upon, both express the same thought.

The court, however, states that the expression "meanwhile, figuring deal confirmed", must be read in connection with the rest of Rothstein's message; that is to say, it must be read in connection with the phrase "satisfactory bank guaranty", and the terms "all asparagus shipped" and "bunch asparagus"; that the record does not show the phrase "satisfactory bank guaranty" has a definite meaning, but, on the contrary, affirmatively shows a wide difference between the parties, and that the terms mentioned do not show the parties had in mind the same character of asparagus. It is difficult, if not impossible, to conceive how the expression mentioned can be read with the phrase and terms mentioned, if there was no meeting of minds, as to their terminology. The expression and phrase and terms employed are diametrically and unalterably opposed and cannot be read together if the parties did not have in mind the same thing. By the use of the expression "meanwhile, figuring deal confirmed" there appears to be a definite understanding between the parties, and if the court is correct, no understanding at all as to the guaranty agreed upon or the character of the asparagus sold. Such a condition cannot logically exist; it contains an ambiguity which requires a resort to the prior parole understanding to clarify it.

This brings us to the question as to whether the phrase "satisfactory bank guaranty" has a definite meaning.

(a) The evidence shows the term "satisfactory bank guaranty" had a definite meaning as between the parties.

The court indicates in its opinion that the evidence does not show that the phrase "satisfactory bank guaranty" has a definite meaning; that the evidence on the other hand shows a wide difference upon the subject between the parties. Here, again, the court falls into error in disturbing an implied finding of the jury as to the definition of this phrase, if, indeed, a wide difference exists upon the subject. If such conflict exists then the finding of the jury is binding upon this court.

Let us eliminate for the time being the word "satisfactory" and the word "bank" and determine whether the term "guaranty" has a definite meaning. In *Words and Phrases,* Second Series, Volume 2, page 800, the author, citing *Bailey v. Miller,* 91 N.E. 24 (Ind.) said:

> "The word 'guaranty' has an established meaning, and ordinarily implies an undertaking by one person that another will perform some engagement."

And quoting from *Miller v. Lewiston National Bank,* 108 Pac. 901, 909 (Idaho), the author said:

> "A guaranty is a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party."

See also:

28 *Corpus Juris,* p. 886, Section 1.

We venture to say that it may not be argued that the word "guaranty" has not a definite meaning, but upon the contrary it is clear and definite. What happens if the word "guaranty" is prefixed by the word "bank"? The use of the word "bank" simply qualifies the word "guaranty" and limits the word "guaranty" to that assumed by a bank; thus a bank guaranty is a guaranty obligation assumed by a bank. Indeed, the term "bank guaranty" is self-explanatory. The fact that there may be different forms is of no consequence, the substance is the same.

In this connection the author in *"Banks and Banking"* by Zollmann, Volume 8, page 2, Section 5101, said, citing *Border National Bank of Eagle Pass, Texas, v. American National Bank of San Francisco, California,* 282 Fed. 73, 79, as follows:

> "A letter of credit is not required to be in any particular form."

In the same section Mr. Zollmann said, in connection with a letter of credit:

> "Since letters of credit are extensively employed in commerce, their wide-spread use and effectiveness should not be limited by narrowing legislative enactment or judicial dicta not essential to a particular decision. They should not be bound by definition so as to become incapable of growth and change in accordance with the development of legitimate business. A letter of credit accordingly need not be in any particular form, need not state on its face that the issuing bank has taken security, nor need the promise necessarily be integrated into a formal letter. It

is enough, that it, in substance, in effect, and intention and in conscience, opens a credit in another city in favor of a third person, who is usually the seller of merchandise."

Again, on page five, Section 5102:

"A letter of credit procured by the buyer at his bank and sent to some bank in the territory of the seller, enables the seller on the delivery of the shipping documents to obtain his money from such bank, which thereupon charges the issuing bank and forwards the shipping document to it. The issuing bank on receipt of the documents charges the seller, or the credit opening bank."

This is the common method by which a bank extends its credit to another.

And a "satisfactory bank guaranty" is one that is satisfactory to the party to whom it is given, that is to say, the seller.

See:

13 *Corpus Juris,* Section 768-2 at pages 675 and 676;

Brenner v. Redlick Furn. Co., 113 Cal. App. 343, 346, and 347;

Coates v. General Motors, 3 Cal. App. (2d) 340, 347;

Schuyler v. Pantages, 54 Cal. App. 83, 85.

These cases were cited and quoted in appellee's brief, but we find nothing in the opinion showing that these cases had no application, on the other hand, in the opinion of appellee, they are determinative of the issue as to the guaranty promised; that is to say, a

contract where one party agrees to perform for the satisfaction of another, it is the right of the other party, to whom the promise is given, to determine whether the performance is satisfactory provided he acts in good faith; nothing is left open for future agreement between the parties. The evidence shows and the jury found that Rothstein promised to furnish Edwards a satisfactory bank guaranty at Isleton when they arrived at a verbal understanding (R. 17, 18), and the answering telegram of Rothstein agreeing to arrange "guarantee payments" is not inconsistent with the phrase "satisfactory bank guaranty". We will have occasion to again revert to this phrase with respect to the law relating thereto in the next division.

Let us now ascertain whether there was a divergence of opinion as to the meaning of the phrase between the parties testifying, although we do not deem it material since the jury found from a conflict of the evidence, if indeed there was a real conflict, that it had a definite meaning. The definition of a "satisfactory bank guaranty" by Rothstein may be dismissed as ludicrous. In it his bank assumed no obligation until the bank was instructed by him to honor a draft upon shipment. He admitted that if he instructed the bank not to honor the draft Edwards could not force the bank to pay and this followed as to each shipment. In other words, no guaranty was assumed by the bank, the definition offers no more than the personal credit of Rothstein. (R. 103, 104.) Obviously, the jury rejected this definition as one constituting a satisfactory bank guaranty.

To the witness, H. P. Garin, the phrase "satisfactory bank guaranty" was not indefinite. He testified that every once in a while they asked for a "satisfactory bank guaranty" as a condition for the sale. He said, on page 48 of the transcript:

> "A satisfactory bank guarantee is where a man puts a certain guarantee with a bank to fulfill his contract and then makes a draft for every shipment, or where a letter of credit is given, or a bond guaranteeing either the seller or the bank if the buyer goes back on the contract."

The bond of which the witness speaks is simply a bond demanded by the bank for its own protection from the party for whom the bank extends its credit. This is a matter which lies solely between the bank and the purchaser, and in which the grower or shipper has no interest. He said that if the bond ran to him instead of the bank it would not constitute a bank guaranty. It will be noted the witness testified that the bank guaranty may be evidenced by a letter of credit, or where a bank agrees to honor drafts covering shipments. (R. 46, 48.) While Markham testified at the outset on this subject that a "satisfactory bank guaranty" meant that a purchaser will give the seller a "satisfactory bank guaranty," (R. 53) and that a bank guaranty means a transfer of monies or the guaranty of the purchaser's bank to the seller's bank the amount of the invoice covering the shipment. It is true he grew greatly confused as to the definition of a satisfactory bank guaranty, still the definition given by him as above set forth constitutes a letter of credit and a letter of credit is a bank guaranty. And,

again it was up to the jury to determine the value of his testimony in this regard as to weight and credibility.

Mr. Edwards testified that a "satisfactory bank guaranty" could be arranged as follows, that is to say, a responsible bank in the East could wire out to Mr. Edwards' bank that they would honor all drafts against a particular party back there who was a customer up to a certain amount of money when the documents are presented. (R. 37.) That another way to meet the requirement of a satisfactory bank guaranty would be for the buyer of the asparagus to furnish an irrevocable letter of credit to his bank permitting them to make payments as shipments and documents were turned over to them. In the first case mentioned Edwards simply stated that Rothstein's bank in the East could wire Edwards' bank out here to honor Edwards' drafts covering shipments. In the second instance, Rothstein's bank was to issue a letter of credit directed to Edwards' bank to honor Edwards' drafts on shipments to Rothstein. As a matter of fact in either case it is simply a letter of credit lodged with the seller's bank by the purchaser's bank to pay drafts presented covering shipments made to the purchaser upon presentation of shipping documents. On pages 112 and 113 of the transcript, Mr. Dinkelspiel as a witness presented the same idea with respect to a bank guaranty. It appears therefore from the record that save the testimony of Rothstein all other witnesses testified in substance as to what constituted a bank guaranty and each in substance was the same. The testimony

of Rothstein must be disregarded as being unbelievable since its definition is not a guaranty at all. Indeed, his entire testimony was evasive and contradictory. He continually fenced with counsel on cross-examination, and finally, it must be borne in mind that Rothstein refused to furnish any guaranty over the credit of his company.

Concluding this branch of our petition we earnestly submit the following:

(1) That the record shows no substantial difference of opinion as to the definition of a "satisfactory bank guaranty", or "bank guaranty."

(2) A "satisfactory bank guaranty" promised another is a bank guaranty meeting the satisfaction of the other who acts in good faith.

(3) If the parties differed as to its meaning it simply went to the form and not to the substance. Moreover, as previously indicated if a difference between the parties did exist it constituted a conflict of evidence and the jury's finding thereon may not be disturbed by this court.

(b) The evidence shows the minds of the parties met as to the character of the asparagus sold.

Here the court has misapprehended the facts and the inferences to be drawn from them. The court states that the evidence shows "shipping asparagus" and "bunch asparagus" to be of the same quality but that "shipping asaparagus" may be loose packed or tied in bunches. It is then said the parties concede that "bunch asparagus" is divided in several classes re-

quiring selection for each class. Appellee does not concede this to be limited to "bunch asparagus" but as the evidence shows and as the jury found that both "shipping asparagus" and "bunch asparagus" are synonymous terms (R. 35, 64); that what applies to one applies to the other; that both may be bunched, or shipped loose packed; that "bunch asparagus" is not bunched asparagus but asparagus fit for bunching. (R. 62.) That "bunch asparagus" like "shipping asparagus" merely refers to a quality; that whether you call it "bunch asparagus" or "shipping asparagus" both when "bunched" are segregated in the same classes according to the same standards. From a standpoint of quality, Rothstein used the terms "bunch asparagus" and "shipping asparagus" interchangeably. (R. 95, 99.)

The statement of the court that the parties concede "bunch asparagus" is divided into several classes requiring selection is apparently based upon the quotation from the testimony of Krasnow, which reads as follows:

> "According to the custom and usage of the asparagus trade, the term "bunch asparagus" has a definite meaning. It means the best asparagus, segregated from the field run of asparagus, with culls, hooks and crooks and broken tips discarded, and consists of so many spears to each bunch. There are five different grades of bunch asparagus."

From this quotation the court apparently draws the inference that "bunch asparagus" alone is divided into the classes designated. The quotation does not

warrant this inference; the mere fact that the quotation states "bunch asparagus" is divided into five different grades does not exclude the idea that "shipping asparagus" may not be divided into five different grades. In drawing such an inference the court passes into the realm of speculation. Moreover, if subject to inference the court has invaded the province of the jury since the findings of the jury are contrary to the inference drawn by the court.

The evidence admittedly shows "bunch" and "shipping asparagus" to be of the same quality, and that "bunch asparagus" is asparagus of sufficient quality to justify bunching (R. 62); that it constitutes the field run minus the culls. The culls are what the word indicates, all asparagus segregated from the field run, which includes hooks, crooks, etc. After the removal of the culls the residue may be called either "bunch asparagus" or "shipping asparagus", a quality justifying bunching for Eastern shipment. The testimony of Krasnow as an expert did not appeal to the jury. In distinguishing the grades of the asparagus he relied upon a piece of paper from which he read; he stated to the court he could not testify without it (R. 107), nor did the verity of his testimony impress the jury. Mr. Edwards testified he had a telephone conversation with Krasnow on Saturday morning, a few days before the trial, in which Krasnow stated he did not remember anything about the deal. (R. 157, 158.) On the stand the witness, Krasnow, testified he did not remember the conversation. (R. 108.)

When a grower sells his crop of "bunch asparagus" or "shipping asparagus" he is not concerned with the

grades it may be divided into; he sells the field run minus the culls before harvest and before segregation. If the asparagus is to be bunched, then either the grower or the purchaser may bunch and pack them according to contract or understanding. In the instant case Edwards, the grower, agreed to bunch and pack the asparagus f. o. b. Isleton. This was agreed at Isleton. (R. 27, 31.)

The opinion next declared that the evidence did not go so far as to support the claim that the phrase "all asparagus shipped" was synonymous with the trade-name "shipping asparagus". In making the assertion that the phrase and the trade name were synonymous the appellant drew the inference from the evidence that the asparagus was to be shipped East; that only "shipping" or "bunch" asparagus was shipped East, and that culls were never shipped East, their value did not justify it. However, it is of no consequence whether the phrase or trade-term may or may not be deemed synonymous, it is sufficient if it may be shown the telegrams with the aid of the prior understanding at Isleton showed the parties had in mind the same quality of asparagus. This raises the issue as to whether resort may be had to the prior understanding at Isleton under an exception to the parole rule to determine the intention of the parties. It is conceded by the court that parole evidence may be resorted to in order to explain an ambiguity, but not to piece out an incomplete writing.

This brings us to the law relating to the issues decided.

III.

THE COURT ERRED IN HOLDING THAT THE TELEGRAMS WERE INSUFFICIENT AS A MEMORANDUM UNDER THE STATUTE OF FRAUDS.

We gather from the opinion of the court that the telegrams were insufficient as a contract because:

(a) They did not constitute a complete contract as to remove it from the bar of the Statute of Frauds.

(b) The answering telegram of Rothstein was not an unconditional acceptance of the offer contained in the telegram of Edwards.

We take it that there is no doubt a contract may be entered into by an exchange of telegrams; that no formal contract is essential, and that a mere note or memorandum containing the essentials is sufficient to meet the requirements of the Statute of Frauds. The question arises, what constitutes the essentials which must be set forth; in other words, what constitutes completeness in a note or memorandum of the contract under the statute? This depends largely if not entirely upon the surrounding circumstances, that is to say, whether the parties have had a prior or contemporaneous verbal understanding. In the instant case the jury found the parties had a complete verbal understanding at Isleton save as to the price to be paid for the asparagus; it will be recalled Edwards demanded $2.00 per crate f. o. b. Isleton for "bunch" or "shipping" asparagus, bunch packed in crates and loaded up to and including April 10, 1934, during the green asparagus season; he gave Rothstein forty-eight hours

to accept the price which was finally accepted by Rothstein's answering telegram.

(a) The telegrams when clarified by the prior understanding at Isleton constituted a complete contract.

Let us assume for the time being that the offer of Edwards in his telegram was "bunch asparagus" instead of "all asparagus shipped" is there any doubt that either party in the event of a dispute could resort to the prior understanding and show that the asparagus was to be bunched and shipped in crates at Isleton by Edwards for $2.00 per crate. Let us go a step further and assume that the word "asparagus" only was used in the telegrams. Is there any doubt that the telegrams as a memorandum would satisfy the Statute of Frauds and that the parties could resort to parole evidence as to the prior understanding to establish the character of the asparagus sold, and the matter of its segregation, packing and shipping at $2.00 per crate. If such a doubt exists then we direct the court's attention to *Rohan v. Proctor,* 61 Cal. App. 447, 455, and *Emlow v. Irwin,* 80 Cal. App. 98. After applying the maxim, which holds to be certain that which can be made certain, the court in *Rohan v. Proctor,* at page 445, said:

> "In order to the validity of the written agreement for a lease it must either be in itself certain as to the kind and character of the improvements to be made upon the premises, the completion of which would fix the beginning of the term, *or it must be susceptible of being made certain by oral evidence showing the prior or contemporaneous understanding of the parties in that regard. But*

> *if the parties have come to no such understanding at the time the written agreement is made, the uncertainty of the writing in that regard is fatal, since it is an uncertainty in a respect essential to its validity which no amount of oral evidence as to a later understanding could remove.* The effect of such evidence would merely be to create an additional oral agreement touching a vital and omitted essential of the writing and thus render the entire contract between the parties oral and hence of necessity obnoxious to the statute of frauds." (Italics ours.)

We have again quoted from this case for the reason it is vital to the decision and for the further reason that this court did not see fit to consider it in its opinion. Had there been no prior understanding then an attempt to show a later verbal understanding, a situation would be presented making the contract partially written and partially oral, or as the court stated, to attempt to piece out the contract, which would come within the bar of the statute.

In the *Rohan* case, the owner agreed verbally to make certain designated alterations and improvements in contemplation of executing a lease. In the written offer to lease it simply referred generally to the alterations and improvements without specification. In holding that a writing must contain all the essentials to satisfy the Statute of Frauds the court regarded the mere general reference to alterations and improvements as being sufficient, permitting a resort to the prior verbal understanding to remove the uncertainty as to what improvements and alterations were verbally

agreed upon. Had there been no reference to alterations and improvements in the written offer the parties could not have introduced a prior oral agreement, since as this court indicated it would constitute a piecing out of the contract in addition to the removal of an ambiguity. There must at least be a general reference to the subject matter; if there has been a prior agreement as to the details they may be admitted to explain the uncertainty or ambiguity brought about by the general reference to the subject matter.

We have no quarrel with the rule announced by *Blue Valley Creamery Co. v. Consolidated Products Company,* 84 Fed. (2d) 182, 187-188. We agree with the rule stated in that case, which rule simply announces in another way that all the essentials must be set forth in the memorandum, but we hold that that case has no analogy to the case before the court, and therefore no application. In the *Blue Valley Creamery* case the plaintiff and defendant entered into a written contract for five years from March 31, 1928, in which the defendant agreed to purchase all the buttermilk of plaintiff for 23¢ per hundred. On December 12, 1931, the defendant wrote plaintiff for a reduction of 5¢ per hundred from the contract price due to market conditions for the year of 1931, in consideration of which defendant agreed to extend the contract for another year to March 31, 1934. Plaintiff replied offering a 3% reduction per 100 in consideration of the extension of the contract for one year. To this plain counter-offer of plaintiff there was an *oral* acceptance.

The contention of plaintiff was that the verbal contract modified the written contract extending it for one year. Plainly there was no such acceptance of the cross-offer of plaintiff as to remove the contract from the Statute of Frauds; since it presents a case which is partially written and partially verbal as to an essential, to wit: a written cross-offer and a verbal acceptance, which plainly has no application. No issue is raised in the instant case as to a verbal acceptance of a cross-offer of defendant. It is the contention of the appellee that the answering telegram of Rothstein was an unconditional acceptance of the written offer of Edwards in the light of the prior understanding.

It seems plain then that if the telegrams simply referred to asparagus as the subject of the sale, resort could be had under an exception to the parol evidence rule to the prior agreement to ascertain the character of the asparagus sold, and to the details of its bunching and packing. In this regard the case would be on all fours with *Rohan v. Proctor,* supra, since its purpose would be simply to remove the uncertainty as to the character of the asparagus sold, and the manner of its bunching and packing as in the *Rohan* case, its purpose was to remove the uncertainty as to the character and extent of the alterations and improvements.

Would the fact that the telegram containing the offer using the phrase "all asparagus shipped" and the answering telegram containing the term "bunch asparagus" require the application of a different rule? The appellee contends that it does not for the reasons above outlined, to wit: that resort may be had to a

prior agreement to remove any ambiguity or uncertainty.

(b) The answering telegram of Rothstein in the light of the prior agreement or understanding at Isleton was an unconditional acceptance of the offer contained in Edwards' telegram.

Aside from the direct and unequivocal admissions of Rothstein to the effect that the parties had entered into a binding contract by the telegrams as heretofore shown, it is the contention of appellee that as to the character of the asparagus sold the face of the telegrams is uncertain and ambiguous permitting a reference to the prior agreement made at Isleton for clarification, under the exception to the parol evidence rule.

It is the further contention of appellee that the evidence pointed out in the preceding section of this petition shows that the parties had agreed upon "bunch asparagus" at Isleton as to the quality sold, which admittedly is the same as "shipping asparagus" and that the phrase "all asparagus shipped" as used in Edwards' telegram, is not inconsistent with the quality of asparagus as represented by "bunch asparagus". "All asparagus shipped" may or may not be "bunch asparagus", it is "bunch asparagus" in the sense of the quality which is shipped East, because it points to asparagus to be shipped. In this regard the inference is reasonable and logical. However, in another sense the term is uncertain and ambiguous, which is best demonstrated by what occurred in this court during the course of argument. Mr. Justice Denman stated that the phrase "all asparagus shipped" meant the shipping of all asparagus. While counsel for ap-

pellant held it may mean the shipping of no asparagus, making it optional with the shipper, while appellee contended it meant "all shipping asparagus". Unless this court can state with absolute certainty that the meaning of "all asparagus shipped" is clear and unequivocal an uncertainty or ambiguity plainly exists, which can be clarified by a consideration of the understanding made at Isleton, where it was agreed that "bunch asparagus" was the subject of the sale and that it would be bunched and crated by appellee. (R. 18, 26, 27, 43.)

Unless, as indicated, a cross-offer can be read from the face of the telegrams with certainty, or unless it may be clearly gathered from the face of the telegrams that the meaning of the phrase "all asparagus shipped" is clear and unequivocal, to the effect that it means something other than "bunch asparagus" there is neither a cross-offer nor a conditional acceptance. This is too plain for argument. Reading the face of the telegram it is plain that the phrase "all asparagus shipped" may or may not mean "bunch asparagus", this being so, the phrase is palpably ambiguous and uncertain, requiring a reference to the former verbal understanding at Isleton for light. In this connection, in *Brewer v. Horst & Lachmund,* 127 Cal. 643, at pages 646 and 647, the court said:

> "If there was nothing to look to but the telegrams, the court might find it difficult, if not impossible, to determine the nature of the contract, or that any contract was entered into between the parties. But the court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all the circumstances under

which it was made; and, if, when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used; and their meaning may be explained as it was understood between the parties. (Mann v. Higgins, 83 Cal. 66; Berry v. Kowalsky, 95 Cal. 134, 29 Am. St. Rep. 101; Callahan v. Stanley, 57 Cal. 476.) Also: '*Parol evidence is always admissible to explain the surrounding circumstances,* and situation and relations of the parties, *at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject matter, and to explain all terms and phrases used in a local or special sense'.*" (Italics ours.)

See also:

Tennant v. Wilde, 98 Cal. App. 437, 445.

These cases are again cited and quoted for the reason that they are vital to the decision of the case, and for the further reason that this court failed to consider them. Indeed, there is not an authority cited by appellee in his brief which apparently this court deemed worthy of mention, but which, in the opinion of appellee, have peculiar application. We earnestly request an examination of authorities submitted by appellee and a showing made wherein they have no application either in point of fact or law.

(c) The term "bank guaranty" is embraced within the terminology of the word "guaranty" and so intended by the parties.

We have already shown by the evidence that Rothstein had agreed to furnish Edwards a bank guaranty satisfactory to the latter, and in so doing nothing was left open for future negotiation, or agreement; that Edwards was the sole judge as to what constituted a satisfactory "bank guaranty"; that the jury so found and that this court is bound by that finding. We have also shown that a bank guaranty constitutes what its name implies in the same manner as what is implied by a bank account, or bank check, or bank book, etc., simply the extension of the bank's credit to a purchaser of merchandise as heretofore defined, the common form being by a letter of credit; we have also shown that there was not such a wide diversity between the parties as to what constituted a bank guaranty; that the only party who had a different view was the defendant, Rothstein, whose definition of it constituted no guaranty at all over and above the credit of defendant, and which a jury of business men obviously rejected. Moreover, the jury found from the evidence, if indeed a conflict existed, as to what constituted a bank guaranty, which is binding upon this court. It also found, supported by the evidence, a satisfactory bank guaranty meant a bank guaranty satisfactory to Mr. Edwards, as promised at Isleton.

It also seems plain that the phrase "will arrange guaranty" is not inconsistent with the term "bank guaranty" since the lesser, the more specific phrase "bank guaranty" is included in the terminology of

the greater, "guaranty". What, in effect, do Edwards and Rothstein say in this connection? Edwards says, I demand a bank guaranty satisfactory to me; Rothstein says, I will arrange the guaranty, that is to say, the guaranty that you ask, meanwhile I figure the deal confirmed. What other reasonable and logical inference can be drawn? Surely, if Rothstein meant he would not furnish a bank guaranty satisfactory to Edwards it would have been an easy matter to have said so; but Rothstein promised him a bank guaranty satisfactory to him at Isleton, which he confirmed. If, on the other hand, he was not acting in good faith, but had a secret intention not to give a satisfactory bank guaranty, this cannot bind Edwards. *The Statute of Frauds may be used as a shield and not a sword.* The fact that he refused to put up any guaranty whatever above and over the so-called credit of his firm in the office of Mr. Dinkelspiel on February 19th shows that he had changed his mind and desired to back out of the contract. As testified by Mr. Edwards, he was acting as a trustee and he did not wish in the event of a break in the market to have Rothstein reject his asparagus and leave it with him to get rid of it the best way he could. If such breach occurred it would force Edwards to go to Philadelphia to file suit for redress; this he did not care to do.

Aside from what we have said with respect to the one phrase embracing the other, we do not believe this court will hold that the phrase in Rothstein's telegram "will arrange guaranty" to be clear and unambiguous when read in the light of the phrase "satisfactory

bank guaranty'' used by Edwards. We contend that if the court does not agree with us that the phrase ''will arrange guaranty'' in Rothstein's telegram referred to the phrase ''satisfactory bank guaranty'' in Edwards' telegram as intending the same thing, that the court will not hold the phrase used by Rothstein to unequivocally exclude that used by Edwards and that the one is not necessarily repugnant to the other; that it is at least susceptible of two constructions, one favorable and the other unfavorable to Edwards. If this be true, then the court must apply the construction which is most favorable to Edwards, since Rothstein caused the uncertainty and ambiguity to exist.

Civil Code of California, Section 1654;
Payne v. Nuvall, 155 Cal. 46;
Hoff v. Lodi Canning Co., 51 Cal. App. 299;
13 *Corpus Juris,* p. 283, Section 87-3.

May me again direct the attention of the court to the fact that none of the above authorities were apparently considered; that we believe this to be a determining issue and suggest that it be given full consideration by the court.

Again, if the phrase mentioned is susceptible of different construction it is ambiguous and under the parole evidence rule we may turn to the understanding at Isleton where Rothstein unequivocally promised Edwards a ''bank guaranty'' satisfactory to him.

In closing our petition we earnestly urge the court to give full and adequate consideration to the evidence and the law in connection with the issues involved. We are firmly of the opinion that the inferences of

fact drawn by the jury, and its findings thereon as well as from the conflicts of the evidence were reasonable and logical; that they find substantial support in the evidence, and that to ignore them or to set them aside is plainly an invasion of the province of the jury. We are likewise firmly of the opinion that the law as cited and quoted by appellee is determinative of the case, when applied to the facts as adjudged in the lower court.

We submit that this court committed the material errors charged and that it should grant appellee a rehearing.

Dated, San Francisco,
December 27, 1937.

DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I, Martin J. Dinkelspiel, hereby certify that I am of counsel for appellee and petitioner in the above entitled proceedings, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not imposed for delay.

Dated, San Francisco,
December 27, 1937.

MARTIN J. DINKELSPIEL,
Of Counsel for Appellee and Petitioner.

No. 8415

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. WAGNER and SON, INCORPORATED,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

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Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Company, 545 Sansome Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Taxpayer:
ANDREW G. ELDER, Esq.,
JOSEPH NIEVINSKI, Esq.

For Comm'r:
T. CALLAHAN, Esq.,
S. B. ANDERSON, Esq.
Transferred to Mr. Murdock 3/7/36.

Docket No. 65845

E. WAGNER & SON, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1932

May 7—Petition received and filed. Taxpayer notified. (Fee paid.)

May 9—Copy of petition served on General Counsel.

Jun. 21—Answer filed by General Counsel.

Aug. 24—Copy of answer served on taxpayer. Circuit Calendar.

Sept. 3—Motion to make answer more definite and certain filed by taxpayer. 9/22/32 copy served.

Sept. 20—Hearing set Oct. 5, 1932 on motion.

1932

Oct. 7—Notice of change of hearing date from 10-5-32 to 10-26-32.

Oct. 26—Hearing had before Mr. Smith on petitioner's motion to make answer more definite and certain—Denied.

Oct. 26—Order that motion to make answer more definite and certain be denied—entered.

1934

July 14—Hearing set week of Sept. 4, 1934 at Seattle, Wash.

Sept. 11—Hearing had before Mr. S. J. McMahon, Div. 16. Submitted on merits. Pet's brief due 12/11/34. Resp's 12/29/34. Pet's reply 1/19/35.

Oct. 9—Transcript of hearing of Sept. 11, 1934, filed.

Dec. 10—Brief filed by taxpayer. 12/11/34 copy served.

Dec. 28—Memo reply brief filed by General Counsel.

1935

Jan. 18—Reply brief filed by taxpayer. 1/19/35 copy served.

1936

May 26—Memorandum findings of fact and opinion rendered. John E. Murdock, Div. 3. Decision will be entered under Rule 50.

Jun. 17—Notice of settlement filed by General Counsel.

Jun. 19—Hearing set July 8, 1936, under Rule 50.

1936

Jun. 29—Consent to settlement filed by taxpayer.

July 6—Decision entered, J. E. Murdock, Div. 3. [1*]

Oct. 5—Supersedeas bond in the amount of $2,666.88 approved and ordered filed.

Oct. 5—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Oct. 5—Affidavit of service of petition for review and notice filed.

Oct. 6—Proof of service of petition for review filed.

Nov. 30—Agreed statement of evidence lodged.

Dec. 1—Agreed statement of evidence approved and ordered filed.

Dec. 3—Praecipe with proof of service thereon filed by taxpayer.

Dec. 3—Order extending time for transmission and delivery of record to January 15, 1937, entered. [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 65845

E. WAGNER & SON, INC., a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Comes now the above-named petitioner and hereby petitions for a redetermination of the deficiency and penalty set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing symbols IT:E:Aj PWH-19624-60D, dated March 12, 1932, and as a basis of this proceeding alleges as follows:

I.

The petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Washington with its principal office at Wenatchee, Washington.

II.

The deficiency letter, a copy of which is attached hereto and marked "Exhibit A", was mailed to the petitioner on March 12, 1932. [3]

III.

The taxes in controversy are income taxes for the year 1929 in the sum of $2,543.44,
plus a negligence penalty of 5% in the amount of 127.17

making a total amount in controversy in the sum of ..... $2,670.61.

IV.

The determination of the taxes set forth in the said notice of deficiency is based upon the following errors:

1. The Commissioner erred in failing to allow the petitioner to deduct its ordinary and necessary expenses including a reasonable allowance for compensation for personal services actually rendered. The Commissioner refused to allow the taxpayer to deduct the sum of $20,000.00, which was paid and/or incurred, to E. WAGNER and OTTO H. WAGNER, employees and officers, as compensation for personal services actually rendered during the year 1929.

2. The Commissioner erred in failing to allow the petitioner to deduct interest in the amount of $2,750.00 which was paid and/or incurred during the year 1929 on loans to the petitioner by its officers and employees and on unpaid balances left with the company during the year. [4]

3. The Commissioner erred in failing to allow a loss sustained during the year 1929 in the amount of $1,233.42 in a transaction entered into with the Wenatchee White Sales Company, which said loss was not compensated for by insurance or otherwise and was incurred in the trade or business of the petitioner and was also incurred in a transaction entered into for profit.

4. The Commissioner erred in finding that

there was an understatement of tax for the year 1929 and in finding that the petitioner was guilty of negligence, and in asserting a five (5%) percent negligence penalty.

STATEMENT OF FACTS

The facts upon which the petitioner relies as a basis of this proceeding, are as follows:

1. The petitioner was incorporated in the year 1924, under and by virtue of the laws of the State of Washington, having its principal office at Wenatchee, Washington.

2. During the year in question the entire capital stock of the petitioner was owned in equal amounts by E. WAGNER, the President, and OTTO H. WAGNER, the Secretary and Treasurer. [5]

3. During the year 1929, the petitioner owned and operated a sawmill in Okanogan County, Washington, and also owned, managed and developed a real estate subdivision.

4. E. WAGNER was the President of the petitioner, and also a trustee. He had the management of the real estate in Wenatchee, Washington, where the petitioner was developing a subdivision, selling lots and tracts and furnishing building materials to purchasers. He also acted as consultant in the management of the sawmill business and assisted in the financial operations and in marketing the petitioner's products. He devoted his entire time to the business of the petitioner.

5. OTTO H. WAGNER was the Secretary and Treasurer of the petitioner. Among other things his duties consisted of the purchasing of the timber, machinery and supplies. He also assisted E. WAGNER in the financing of the petitioner's operations and marketing of its products and had general supervision of the petitioner's operations in the woods, mill and factory. He devoted all of his time to the business of the petitioner.

6. During the year 1929 the Board of Trustees of the petitioner voted to pay to E. WAGNER and to OTTO H. WAGNER for their services for the year 1929 the sum of TEN THOUSAND ($10,000.00) DOLLARS, each, and it was agreed between the petitioner and each of said [6] parties that such compensation would be paid for the year 1929. During the latter part of September 1929, after due consideration, the Board of Trustees passed a resolution to pay to said E. WAGNER and OTTO H. WAGNER a bonus of $3,000.00 each as additional compensation for their services during the year 1929. The Commissioner disallowed officers salaries in the amount of $20,000.00 as stated in his deficiency letter on the alleged ground that "they were not paid or incurred within the taxable year."

7. The amount of $13,000.00 was no more than a reasonable compensation for the personal services actually rendered to the petitioner during the year 1929 by the said E.

WAGNER and OTTO H. WAGNER and the petitioner actually agreed to pay said sums during the year 1929 to each of said parties. Both of said parties and their respective wives reported the said entire amounts as income for the year 1929 in their personal income tax returns for the year 1929 and paid tax thereon.

8. From the date of its incorporation petitioner was in need of working capital and both the said E. WAGNER and OTTO H. WAGNER left on hand with the petitioner undrawn portions of their salary and wages and also made various loans to the petitioner. In connection [7] with its bank loans, the petitioner was paying and was obligated to pay interest at the rate of 10 percent per annum. The legal rate of interest in the state of Washington in the absence of an agreement to the contrary was and is six (6) percent. In the month of August of 1929 the Board of Trustees voted to allow interest on all moneys left in the business and also on moneys loaned to the petitioner inasmuch as the petitioner was relieved of borrowing said money elsewhere on which it was paying the rate of 10%. Although no set rate of interest was mentioned in said resolution it was understood that the rate charged by the local banks would govern. Figured on minimum monthly balances, the petitioner incurred, during the year 1929, an obligation for interest to E. WAGNER and OTTO H. WAGNER in the amount of $2,750.00,

which amount the Commissioner refused to allow as stated in his deficiency letter on the following alleged ground:

> "4. Interest in the amount of $2,750.00 has been disallowed since it did not accrue within the taxable year."

9. In April 1929, the petitioner contracted with the Wenatchee White Sales Company for two (2) White motor trucks at $5,525.00 each. The contract called for payment with apple box shook at 14.21¢ [8] per box; and shook in the full contract price at the agreed rates was duly shipped and delivered to the Sales Company. The petitioner credited on its books to sales the entire amount at said agreed price. Before the end of 1929, the said Wenatchee White Sales Company failed and refused to apply on petitioner's contract the sum of $1,233.42. In the meantime the Wenatchee White Sales Company had sold, transferred and negotiated the conditional sales contracts which the petitioner had signed on the two trucks and the petitioner was required to pay the full contract price to the assignee. The said Sales Company was unable to meet said indebtedness of $1,233.42 in 1929 or at any subsequent time and by reason thereof petitioner sustained a loss of $1,233.42 for which it was never compensated.

10. The petitioner acted in good faith in preparing its income tax return for the year 1929 and was not guilty of negligence.

WHEREFORE, the petitioner prays that this Board may hear this proceeding and grant it relief from the determination of the respondent by finding and adjudging that there is no deficiency in tax for the year 1929; and that the petitioner [9] has made an overpayment of tax for the year 1929 and for such other and further relief as to the Board may seem just and equitable.

(s) ANDREW G. ELDER
(s) JOSEPH NIEVINSKI
Attorneys for Petitioner,
705-6 Dexter Horton Building,
Seattle, Washington.

State of Washington
County of Okanogan—ss.

OTTO H. WAGNER, being first duly sworn on oath deposes and says: That he is the Secretary and Treasurer of E. WAGNER & SON, INC., a corporation, the petitioner above-named, and as such is authorized to verify the foregoing petition. That he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true except as to those facts stated to be upon information and belief and those facts he believes to be true.

(s) OTTO H. WAGNER

Subscribed and sworn to before me this 30th day of April, 1932.

[Notary Seal] (s) H. GORDON KERR
Notary Public in and for the State of Washington,
residing at Okanogan.

For Exhibit "A" referred to herein, see Exhibit "1", attached to Statement of Evidence.

[Endorsed]: Filed May 7, 1932. [10]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(1) to (4) incl. Denies errors in the action recited in subparagraphs (1) to (4), inclusive, of paragraph 4 of the petition.

5(1) to (10) incl. Denies each and every allegation of fact contained in subparagraphs (1) to (10), inclusive, of paragraph 5 of the petition which is inconsistent with and contrary to the determination of the Commissioner as stated in the notice of final determination of deficiency dated March 12, 1932.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
THOS. F. CALLAHAN,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed June 21, 1932. [11]

[Title of Court and Cause.]

Joseph Nievinski, Esq., for the petitioner.
S. B. Anderson, Esq., for the respondent.

MEMORANDUM FINDING OF FACTS AND OPINION.

The Commissioner determined a deficiency in income tax for the year 1929 in the amount of $2,543.44 and a penalty of 5 per cent for negligence in the amount of $127.17. The petitioner abandoned one of its assignments of error at the hearing. The issues are: (1) the amount which the petitioner is entitled to deduct as a reasonable allowance for salaries or compensation of its officers; (2) whether it is entitled to deduct certain amounts as interest accrued on loans from its officers and on undrawn salaries and bonuses of such officers; and (3) whether any part of the deficiency is due to negligence. [12]

FINDINGS OF FACT

The petitioner is a corporation of the State of Washington. E. Wagner and his son, Otto H. Wagner, at all times material to this proceeding, owned all of its stock in equal proportions. The former was president and the latter was secretary and treasurer and general manager. They were also the trustees or directors of the petitioner and devoted their entire time to the management of its business. The petitioner's books were kept on an accrual basis.

E. Wagner and Otto H. Wagner, as trustees of the petitioner, held two meetings during 1929 for the purpose of considering the subject of their compensation as officers. They decided in June, 1929, that they should receive an annual salary of $10,000 each for 1929 and subsequent years. They decided in September, 1929, that they should receive a bonus of $3,000 each for the services performed during 1929. No minutes or other written record or memorandum was made of the action taken at these meetings. The petitioner after the close of the year in closing its books for the year 1929, made entries under date of December 31, 1929, debiting officers' salaries in the amount of $26,000 and crediting E. Wagner in the amount of $13,000 and Otto H. Wagner in the amount of $13,000. The petitioner claimed a deduction in its return on account of compensation of its officers in the amount of $26,000. The Commissioner disallowed $20,000 of the amount so claimed.

A reasonable allowance for salaries or other compensation for personal services actually rendered to the petitioner during the year 1929 is $4,000 in the case of E. Wagner and $10,000 in the case of Otto H. Wagner. [13]

E. Wagner and Otto H. Wagner made loans to the petitioner prior to and during 1929, and, in addition to those loans, they left with the petitioner parts of their salaries for years prior to 1929. Interest for the year 1929 on those amounts, computed at the rate of 6 per cent, amounts to $1,228.69. E. Wagner and Otto H. Wagner did not withdraw any of the salary or bonus authorized by the petitioner for the year 1929. E. Wagner and Otto H. Wagner, as trustees, never had any meetings with reference to the allowance by the corporation of interest on any of the loans or undrawn salaries and bonuses, nor did they ever as individuals enter into any agreement with the petitioner respecting the allowance or payment of interest thereon. The determination of the petitioner to allow interest on these amounts was first made in April, 1930, when its books were being closed for the year 1929. At that time the petitioner made entries under date of December 31, 1929, debiting interest in the amount of $2,750 with the explanation "interest accrued on loans from officers" and crediting E. Wagner in the amount of $500, and Otto H. Wagner in the amount of $2,250. In its return for the year 1929 the petitioner claimed a deduction for interest in the amount of $4,759.53.

The Commissioner disallowed $2,750 of the amount claimed.

The Commissioner determined that the petitioner was negligent in understating its tax and asserted a penalty of 5 per cent under section 293(a) of the Revenue Act of 1928. No part of the deficiency was due to negligence, or intentional disregard of rules and regulations.

OPINION

MURDOCK: The Commissioner allowed $6,000 and disallowed $20,000 of [14] the amount claimed by the petitioner as a deduction for officers' salaries. The petitioner has assumed the burden of showing not only that the salaries claimed were authorized during the year 1930, but also that they represented reasonable compensation for the personal services actually rendered by the officers. The assumption of this full burden of proof was proper. The evidence shows that the total amount of $26,000 was actually authorized at two meetings of the two Wagners. They were the only officers and the only stockholders of the corporation. Their salaries in past years ranged from $2,000 to $4,000 each. No dividends had ever been paid. The circumstances justify close scrutiny to see that earnings were not being distributed in the guise of salaries.

The principal business of the corporation was the operation of a box factory. The volume of business of the box factory increased very materially during the year 1929. Double shifts were

employed for a part of the year. Otto H. Wagner was in charge of the box factory. The services which he performed in the taxable year were considerably greater than were the services which he had performed in prior years. The evidence as a whole indicates that a reasonable salary for the services which he performed during the year would be $10,000.

E. Wagner, an elderly man and father of Otto H. Wagner, was in charge of some real estate operations of the company at a point some distance from the box factory. He had been similarly engaged in prior years. The evidence does not indicate that there was any substantial increase in the duties performed by him or in the volume of business handled by him. He also had some duties in connection with the business of the box factory. The evidence does not show that he devoted any more of his time to the box factory [15] business or performed substantially heavier duties in connection with that business in 1929 than in former years. In fact he was away from the business for the latter part of the year. The highest salary that he had received in prior years was $4,000. The evidence does not justify a larger amount as reasonable compensation for his services during 1929.

The next question is to determine whether the petitioner is entitled to a deduction for interest accrued in excess of $2,009.53, the amount allowed by the Commissioner. The petitioner claimed an additional amount of $2,750. The record does not adequately explain how any of these amounts was

determined. The petitioner included interest at 10 per cent in computing the deduction which it claimed. Interest at 6 per cent on loans and undrawn salaries for prior years may have been included by the Commissioner in the deduction of $2,009.53 which he allowed. Interest at 6 per cent on loans and undrawn salaries of prior years would be a proper deduction. But interest at a higher rate would not be proper in the absence of an express agreement to pay some certain rate. The petitioner claims also some interest on the salaries and bonuses for the current year, but the evidence does not indicate that any part of the salaries or bonuses was payable prior to the end of the year. The petitioner has failed to prove that it is entitled to any larger deduction for interest than the amount allowed by the Commissioner.

The final issue in regard to negligence is settled by the findings of fact. The evidence indicates that no part of the deficiency is due to negligence or intentional disregard of the rules and regulations.

Reviewed by the Board.

Decision will be entered under Rule 50.

Entered May 26, 1936. [16]

McMAHON, concurring in part and dissenting in part: I concur in the holding of the majority that no part of the deficiency is due to negligence or intentional disregard of the rules and regulations and that therefore no penalty should be asserted; and I agree that the evidence should be closely scrutinized.

I dissent from the holding of the majority that a reasonable allowance for salaries or other compensation for personal services actually rendered to the petitioner during 1929 is $4,000 in the case of E. Wagner and $10,000 in the case of Otto H. Wagner. After having considered the entire record it is my opinion that it should be found as a fact and held that the amount of $13,000 was reasonable compensation for the personal services actually rendered petitioner by each of those officers in the year in question.

The facts that the compensation paid to the Wagners was in proportion to their stock interests and that no dividends were ever declared or paid by petitioner are not fatal to petitioner's contention, under all the facts and circumstances here. It is apparent that the reason dividends were never declared or paid is that the business was expanding and the funds of the petitioner were needed for that purpose. The compensation of the two Wagners in years prior to 1929 for even lesser services rendered by them in those years was small for this same reason; and the evidence shows that in such prior years these men were underpaid.

The evidence shows that the petitioner's first big year of operation was 1929, and that by that time the business of the mill had grown to such an extent that petitioner employed a double shift commencing June 1, 1929. No double shift had been needed and no lots had been subdivided and sold before: The superintendent employed by petitioner in a lesser capacity than that of either of the Wag-

ners drew compensation for 1929 in a total amount of approximately [17] $7,200. He put in about half the time that each of the Wagners were putting in. It is true that E. Wagner was forced to take a trip on account of his health in the latter part of 1929 but this was due to a breakdown in health caused by overwork. Furthermore, it was after the working season of the petitioner was over. Petitioner's operations are seasonal and its most active business season is from April until October or November. E. Wagner was founder and president of petitioner; and, among others, his duties for petitioner consisted in part in transforming unprofitable orchard property of petitioner into salable town lots and tracts and building homes thereon. Petitioner's principal office was located at Wenatchee, where he resided. He also assisted in financing the building of houses. His duties also included selling box shooks made at the factory and lumber, at Wenatchee; and he frequently made trips to Okanagon, where the factory was located, about ninety miles away, to confer with his son as to the policies to be employed in both branches of petitioner's business. In 1929 there were 20 to 30 men working under his supervision at Wenatchee. He also helped in scouting timber for the factory and saw mill. He devoted all his time to the petitioner's business in 1929 and worked both by day and by night. E. Wagner was more experienced in business than Otto H. Wagner. In prior years, 1906 to 1917, he had earned in the saw mill business at least $40,000 per year. Otto

H. Wagner was secretary, treasurer and general manager of petitioner.

The evidence shows that in the executive and administrative end of the mill business the petitioner, during 1929, had the two Wagners and a bookkeeper, that during two months in the summertime this bookkeeper had an assistant, that competitors of the petitioner having businesses similar to that of the petitioner usually have seven or eight employees in the administrative and executive end of their businesses, and that the petitioner would have had at least [18] two employees for the Wenatchee operations and five for the mill operations in the administrative and executive end of the work if it had conducted its business along the line of others similarly situated.

The evidence shows that the gross sales of petitioner in 1929 amounted to $221,723.63, and that its final return for the year 1929 shows gross income of $74,642.42, total deductions of $61,972.37, including $26,000 as a deduction for compensation of the Wagners, net income of $12,670.05, and tax due of $1,063.71.

The record fails to disclose evidence to support a finding of fact or holding that a reasonable allowance as compensation for services rendered by the Wagners for the year 1929 is less than $13,000 each. The witnesses for petitioner were intelligent, candid and in all respects credible; their testimony was not impeached; and no countervailing evidence

was offered by respondent. Petitioner has established a prima facie case, at least, upon this issue.

I also dissent from the holding of the majority that petitioner has failed to prove that it is entitled to any larger deduction for interest than $2,009.53, the amount allowed by the respondent. The evidence shows that during the year 1929 the petitioner owed E. Wagner and Otto H. Wagner amounts representing advances and undrawn compensation. At the hearing counsel for respondent stated that there was no objection to showing what the computation of interest would be at six per cent and exhibits showing the same were received in evidence without objection. Counsel for respondent reserved only the right to question the right of petitioner to any deduction for interest, and his sole ground was that there was no agreement to pay interest. From the reporter's transcript of what occurred at the hearing it is clear that counsel for the respondent agreed to the receipt of the exhibits in evidence for the purpose of showing the amount of interest due in the event that the Board should hold that there was liability on the part of petitioner to pay interest. The transcript is in part as follows: [19]

> Mr. ANDERSON (Respondent's Atty.): Your Honor, I do not understand the real purpose of this offer. What does it purport to show? Counsel states it is interest. I will admit that, and I will admit that the figures were taken from the books, but I would like to

have counsel explain what the purpose of the offer is.

Mr. NIEVINSKI (Petitioner's Atty.): It is for the purpose of showing the interest due on advances and on salaries.

Mr. ANDERSON: I have no objection to showing what the computation of interest would be at six per cent * * *.

Mr. NIEVINSKI: That is all there is here, a statement showing that.

Mr. ANDERSON: With that reservation I have no objection to its going in.

In the notice of deficiency respondent stated that "Interest in the amount of $2750. has been disallowed since it did not *accrue* within the taxable year." (Emphasis supplied.) Furthermore, the witness who prepared the exhibits testified that the items of loans and undrawn compensation included in such exhibits are correct and were taken from the books as closed for the year 1929. Respondent makes no contention anywhere in the record that the liability for the principal amounts was not incurred and owing as represented in such exhibits. In his brief upon this issue he relies solely upon the proposition that no interest was incurred for the reason that there was no agreement and, hence, no liability to pay interest. The transcript also discloses that respondent's counsel had examined these exhibits the day before the hearing and that the books were produced at the hearing. In such exhibits the liabilities for the salaries were treated as having ac-

crued monthly and the liabilities for bonuses were treated as having accrued as of October 1, 1929. In the majority opinion it is stated that the evidence does not indicate that any part of the salaries or bonuses was payable prior to the end of the year. The books, as closed, show that the salaries were payable monthly, and that the bonuses were payable on October 1, 1929, and respondent has made no contention to the contrary. In fact, as stated, he in effect agreed that the exhibits were correct, and such exhibits treat the compensation as payable prior to the close of the year. Furthermore, in the absence of any agreement to the contrary, it is the [20] universal custom to treat salaries as accruing monthly even though they are fixed at a yearly rate. Otherwise, people dependent upon their salaries would be unable to meet living expenses. In neither the case of the salary nor the case of the bonus is interest claimed before the date on which the payment was duly authorized and respondent has raised no question as to this. The bonuses were payable forthwith; and being on the accrual basis, they were accruable when authorized, and the salaries were accruable at the end of each month. There is nothing in the record to require or justify a failure or refusal to accept these exhibits for the purpose for which they were offered and received. The exhibits show that the interest which accrued within the year 1929 upon the loans and forbearances of E. Wagner and Otto H. Wagner at the rate of six per cent amounted to $404.89 and $1,338.84, respectively. These figures are based on allowances

of $13,000 as reasonable compensation for each of the Wagners for 1929, in addition to loans.

It is true that there was no agreement ever made between the petitioner and the Wagners providing for the payment of interest, and the question for determination is whether, in this situation, interest accrued upon this indebtedness within the year 1929 within the meaning of section 23(b) of the Revenue Act of 1928.

In George D. Davidson Co. of Cal., 14 B. T. A. 91, we defined the word "accrue" in connection with similar provisions of the Revenue Act of 1921 as follows:

> To "accrue" means to come into existence; to accumulate to become vested; Standard Dictionary, Webster's Dictionary; Bouvier's Law Dictionary; Words and Phrases Judicially defined. In the sense in which the word is used in the above statute, interest deductible as accruing in any taxable year means interest which has come into existence, has become vested, during such taxable year. [21]

Section 7299 of Volume 2 of Remington's Compiled Statutes of Washington, 1922[1], provides that

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(1) § 7299. Every *loan* or *forbearance* of money, goods, or thing in action shall bear interest at the rate of six per centum per annum where no different rate is agreed to in writing between the parties. The discounting of commercial paper, where the borrower makes himself liable as a maker, guarantor or indorser, shall be considered as a loan for the purposes of this chapter. * * * (Emphasis supplied)

where no different rate of interest *in* agreed to in writing by the parties every loan or forbearance of money shall bear interest at the rate of six per cent.

The word "forbearance" is defined in Black's Law Dictionary, Third Edition, as follows:

> FORBEARANCE. The art of abstaining from proceeding against a delinquent debtor; delay in exacting the enforcement of a right, indulgence granted to a debtor. Reynolds v. Ward, 5 Wend. (N. Y.) 504; Diercks v. Kennedy, 16 N. J. Eq. 211; Dry Dock Bank v. American Life Ins. Etc., Co. 3 N. Y. 354.
>
> Refraining from action. The term is used in this sense in general jurisprudence, in contradistinction to "act".

This Washington statute is specifically designed to operate where there is no agreement as to interest and, of course, the lack of an agreement here as to interest is, therefore, not fatal to petitioner's claims. Under this statute of the State of Washington, in the instant proceeding there were both loans and forbearances of money; and interest at the rate of six per cent accrued within the taxable year 1929 upon the loans (Dornberg v. Black Carbon Coal Co., 93 Wash. 682, 161 P. 845) and forbearances of money (Bonner v. Billings, 107 Wash. 1, 181 Pac. 19, and Dornberg v. Black Carbon Coal Co., supra.) Such interest is deductible by petitioner in such year. It does not matter that the amounts were not actually accrued on the books

of the petitioner during the taxable year. It is elementary that books entries or lack of them are not controlling. The facts control. Furthermore, these books, as closed, show such interest. [22]

In the majority opinion it is stated that interest at six per cent on loans and undrawn salaries for prior years may have been included by the Commissioner in the deduction of $2,009.53 which he allowed for 1929, and that the petitioner has failed to prove that it is entitled to any larger deduction for interest than the amount allowed by the Commissioner. This is not sufficient reason for denying the petitioner a deduction for the amount of interest which is properly deductible. No issue is raised as to what the respondent did or did not do in this respect. So far as the record shows the amounts of interest shown on the exhibits are in addition to the amounts already allowed by the respondent for the year 1929; in any event, the respondent does not question that this is so; on the contrary, he admits this, as heretofore fully pointed out. It is shown by the evidence that petitioner did have other interest to pay during 1929, in addition to its interest obligations to the Wagners. In 1929 bankers advanced petitioner credit for payrolls in the maximum amount of $15,000. Petitioner generally was required to pay interest upon bank loans at the rate of 10 per cent discounted in advance, although it did at an undisclosed time secure some money in Seattle

at 8 per cent. Any necessary adjustment can be made in the recomputation under Rule 50.

The parties have, in reality, and very properly, submitted to us the narrow issue as to whether the lack of an agreement to pay interest defeats the deduction and as stated above it does not. The parties should be allowed some reasonable latitude in the presentation of issues to this Board and when a narrow issue, such as we have here, is presented, the Board should not go beyond that and decide something not contemplated by the parties. The rule applicable to the Federal courts, which review our decisions, thus limits them. (General Utilities & Operating Co. v. Helvering, 56 S. Ct. 185;) and a similar rule should [23] be applied to this Board in respect to its own decisions. In any event, petitioner has established a prima facie case as to the amount of deductible interest, which has not been overcome by respondent.

If the Wagners had disposed of their stock interests in the petitioner and had ceased to be officers or employees thereof and a question had arisen as to their rights to collect the advances and undrawn compensation together with the interest thereon, upon the showing made in the instant proceeding, they could, in a suit in a proper tribunal, have recovered the full amounts thereof because they are valid obligations. Furthermore, the amounts claimed for compensation are reasonable amounts for the personal services actually rendered by each of them.

Since I presided at the hearing in this proceeding, I deem it my duty to thus fully set forth my views. The evidence could be further quoted in support of the foregoing statements as to the proof, but, in the interests of brevity, I forego doing so.

LEECH concurs in the above dissent in so far as it refuses to sustain the Commissioner's disallowance of the salary items. [24]

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 65845.

E. WAGNER & SON, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the Board's Memorandum Findings of Fact and Opinion, entered May 26, 1936, the respondent on June 17, 1936, having filed a proposed computation, and the petitioner on June 29, 1936, having filed notice of acquiescence to the said computation, it is

ORDERED and DECIDED that there is a deficiency for the year 1929 in the amount of $1,333.44.

(Signed) J. E. MURDOCK
Member, United States
Board of Tax Appeals.

Entered July 6, 1936. [25]

[Title of Court and Cause.]

PETITION OF E. WAGNER & SON, INC., FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT OF A DECISION BY THE UNITED STATES BOARD OF TAX APPEALS.

E. Wagner & Son, Inc., the petitioner in this cause, by Andrew G. Elder and Cyril D. Hill, counsel, hereby files its petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by the United States Board of Tax Appeals rendered on July 6, 1936, 34 BTA ....., No. ....., determining deficiencies in the petitioner's Federal income tax for the calendar year 1929 in the amount of $1333.44, and respectfully shows:

I.

The petitioner, E. Wagner & Son, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office in Okanogan, Washington. [26]

The income tax return of the said corporation for the taxable year 1929 was duly filed within the time provided therefor, with the Collector of Internal Revenue for the District of Washington, within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

NATURE OF THE CONTROVERSY

The controversy involves the proper determination of the petitioner's liability for Federal income tax for the calendar year 1929.

Mr. E. Wagner was president of the petitioner corporation at all times material to these proceedings, and Otto H. Wagner was secretary, treasurer and general manager. They were also the trustees and devoted their entire time to the management of its business. The petitioner's books were kept on an accrual basis.

Mr. E. Wagner and Otto H. Wagner, as trustees of the petitioner, held two meetings during 1929 for the purpose of considering their compensation. They decided in June, 1929, that they should receive a salary of $10,000.00 each for 1929 and subsequent years. At the meeting held in September, 1929, it was decided that they should each receive a bonus of $3,000.00 for services performed during 1929. The total sum of $13,000.00 for Mr. E. Wagner and a like sum for Otto H. Wagner were reasonable values for personal services rendered by these men during the year 1929. The petitioner claimed a deduction in its income tax return for the calendar year 1929 [27] on account of compensation paid its officers in the amount of $26,000.00. The Commissioner of Internal Revenue disallowed $20,000.00 of the amount claimed. Upon petition for redetermination the Board allowed $10,000.00 for Otto H. Wagner and $4,000.00 for E. Wagner.

Mr. E. Wagner and Otto H. Wagner made loans to the petitioner prior to and during 1929, and in addition thereto, they left undrawn with the petitioner part of their salaries for the years prior to 1929. They also left undrawn their salaries and bonuses authorized by the petitioner for the year 1929. Interest on these amounts was deducted by the petitioner in its income tax return for the calendar year 1929. The Commissioner of Internal Revenue allowed interest during this year on loans made prior to 1929, and on undrawn salaries of these officers of the petitioner for years prior to 1929. However, the Commsisioner of Internal Revenue disallowed interest in the amount of $2,750.00 representing interest on loans made to petitioner during 1929, and upon salaries and bonuses left with the petitioner for the year 1929, which action was sustained by the Board.

III.

The said petitioner being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the United States Board of Tax Appeals, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit. [28]

IV.

ASSIGNMENTS OF ERROR

The petitioner assigns as error the following acts and omissions of the United States Board of Tax Appeals:

(1) The finding that a reasonable allowance as compensation for services rendered by E. Wagner for the year 1929 was less than $13,000.00, is unsupported by any evidence.

(2) The finding that a reasonable allowance as compensation for services rendered by Otto H. Wagner for the year 1929 less than $13,000.00, is unsupported by any evidence.

(3) The finding that petitioner is not entitled to the deduction from petitioner's gross income for the year 1929, of the sum of $13,000.00 for compensation for personal services rendered by E. Wagner, is unsupported by any evidence.

(4) The finding that petitioner is not entitled to the deduction from petitioner's gross income for the year 1929 of the sum of $13,000.00 for compensation for personal services rendered by Otto H. Wagner, is unsupported by any evidence.

(5) The finding that petitioner is not entitled to the deduction of $2,906.22 (corrected amount instead of $2,750.00) interest at 10% (the contract rate) paid on loans and undrawn salaries for 1929, is unsupported by any evidence.

(6) The finding that petitioner is not entitled to a deduction of at least $1,743.73 interest at 6% (the statutory rate in the State of Washington) on loans and undrawn salaries for 1929, is unsupported by any evidence.

(7) The findings of fact are not supported by the evidence. [29]

(8) The findings of fact are contrary to the evidence.

(9) The finding that the interest disallowed by respondent related to other than undrawn salaries and bonuses payable for services rendered in 1929, and loans made to petitioner during 1929, is unsupported by any evidence.

(10) The failure to allow as a deduction from the petitioner's gross income for the year 1929 the sum of $13,000.00 for compensation for personal services rendered by E. Wagner.

(11) The failure to allow as a deduction from the petitioner's gross income for the year 1929 the sum of $13,000.00 for compensation for personal services rendered by Otto H. Wagner.

(12) The failure to determine that the sum of $13,000.00 was a reasonable allowance for compensation for personal services of E. Wagner for the year 1929.

(13) The failure to determine that the sum of $13,000.00 was a reasonable allowance for compensation for personal services of Otto H. Wagner for the year 1929.

(14) The failure to allow as a deduction from the petitioner's gross income for the year 1929 the sum of $2,906.22 (corrected amount instead of $2,750.00) interest at 10% (the contract rate) paid on loans to the petitioner by its officers and on unpaid balances left with the company during the year. [30]

(15) The failure to allow as a deduction from the petitioner's gross income for the year 1929 at least the sum of $1,743.73 interest at 6% (the statutory rate in the State of Washington) on loans

to the petitioner by its officers and on unpaid balances left with the company during the year.

(16) The finding of a deficiency for the year 1929 instead of the determination that there is no deficiency in income tax for the said year.

(s) ANDREW G. ELDER
(s) CYRIL D. HILL
Attorneys for Petitioner
1261 Dexter Horton Building
Seattle, King County, Washington

State of Washington,
County of King.—ss.

ANDREW G. ELDER, being first duly sworn upon oath deposes and says: The he is counsel of record in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read [31] the said petition, and is familiar with the statements contained therein, and that the statements made are true to the best of his knowledge, information and belief.

(s) ANDREW G. ELDER

Subscribed and sworn to before me this 29 day of September, 1936.

(s) WILLIAM A. BOWLES
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Oct. 5, 1936. [32]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause was heard before the United States Board of Tax Appeals at Seattle, Washington, the Honorable Stephen J. McMahon presiding, on September 11, 1934. The following represents a statement of the evidence introduced at such hearing:

A copy of the deficiency letter in this case dated March 12, 1932, was received in evidence without objection and marked Petitioner's Exhibit 1.

MR. ALFRED T. CARNE,

being called by petitioner as a witness having been first duly sworn, testified as follows:

Direct Examination

My name is Alfred T. Carne, residing at Okanogan, Washington. I am the bookkeeper of the petitioner, E. Wagner & Son, Inc., and have been associated with this concern since 1911 with some intermissions. I kept the books and made up income tax returns for the years 1924 to 1930 inclusive. I have here the books that shw the salaries of E. Wagner and Otto H. Wagner for these years. The salaries of Mr. E. Wagner were:

$	2,000.00	in 1924
	2,000.00	in 1925 [33]
	4,000.00	in 1926
	2,000.00	in 1927
	2,000.00	in 1928
	13,000.00	in 1929 and
	10,000.00	in 1930

(Testimony of Alfred T. Carne.)

The salaries of Mr. Otto H. Wagner were:

$ 2,000.00	in 1924
2,000.00	in 1925
4,000.00	in 1926
2,000.00	in 1927
2,000.00	in 1928
13,000.00	in 1929 and
10,000.00	in 1930

These books show the gross sales of the company:

$ 20,101.34	in 1924
50,650.17	in 1925
94,197.21	in 1926
95,484.67	in 1927
143,880.41	in 1928
221,723.63	in 1929 or less freight and allowances, $209,140.59.

Whereupon there was identified the tentative income tax return for E. Wagner & Son, Inc., for 1929, the same being marked for identification as "Petitioner's Exhibit No. 2".

I prepared Petitioner's Exhibit 2 in Seattle. I was employed during 1929 by Fix and Latimer and was not in petitioner's office during 1929 and 1930. However, I was employed by petitioner to close the books, make up income tax returns and submit a balance sheet. I secured the information for the testative return for 1929 over the telephone from Mr. Otto H. Wagner. I made it out in my own handwriting and I think I mailed it to him. I did not take the usual and customary deductions that

(Testimony of Alfred T. Carne.)

are taken for a corporation as I probably did not have the information before me.

Whereupon there was identified the corporation income tax return [34] of E. Wagner & Son, Inc., for the year 1929, the same being marked for identification as "Petitioner's Exhibit No. 3".

I prepared Petitioner's Exhibit 3, the corporation income tax return for the year 1929. It is in my handwriting. It was prepared in Seattle. Mr. Otto Wagner came to Seattle and furnished me with books and papers with the information. He told me the salaries of E. Wagner and Otto H. Wagner for 1929 were $10,000 a year each and there was a bonus of $3000. I was a little surprised. I do not remember anything being said about officers salaries in making the tentative return. He told me of these salaries before I completed my computation of determining the income tax for the year 1929.

Whereupon there was identified the original cash book and journal, pages J 147, J 148, J 149, J 150, of which were then marked "Petitioner's Exhibit No. 5", which was admitted in evidence and is hereby included and will be designated as a part of this statement of evidence.

Petitioner's Exhibit 5 consists of pages J 147, J 148, J 149, J 150 from the original cash book and journal subsequently used by me in the nature of a memorandum for subsequent transcription to the journal. On page number J 147 is a memorandum of information that Mr. Wagner gave me in 1930

(Testimony of Alfred T. Carne.)

at the time I prepared the final report for 1929. The third closing entry for 1929 on this page refers to salaries for 1929. There are sixteen subsequent entries on this page. At the time I made the third entry I was not in a position to compute the income tax for 1929. [35]

I have prepared a computation of the advances to the company by Mr. E. Wagner and Mr. Otto H. Wagner and the amounts of their undrawn salaries left with the company. I have computed the interest at six per cent and at ten per cent on those balances due at that time.

Whereupon there was identified the computations of advances, undrawn salaries and interest thereon, of E. Wagner and of Otto H. Wagner, the same being marked for identification as "Petitioner's Exhibit No. 6", and "Petitioner's Exhibit No. 7", respectively.

Petitioner's Exhibit 6 for identification is prepared from the books of the company. The first column under the heading "Amount" indicates the balance that the company was indebted to Mr. E. Wagner. The first twelve items in this column do not take into account any salary for E. Wagner for the year 1929. Below these items I have computed the undrawn salary of Mr. E. Wagner for 1929. Under the heading of "Interest" I have computed first on the advances made by Mr. E. Wagner to the corporation prior to January 1, 1929, at six per cent for the entire year 1929 under the heading "six per cent", and at ten per cent.

(Testimony of Alfred T. Carne.)

I have separately computed thereon the interest that would be due at six per cent on the undrawn salary of Mr. E. Wagner for the year 1929 and also at ten per cent.

The books on which this is based are here.

"Mr. NIEVINSKI (For Petitioner): I will offer that in evidence, if your Honor please, as Petitioner's Exhibit No. 6.

"Mr. ANDERSON (For Respondent): Your Honor, I do not [36] understand the real purpose of this offer. What does it purport to show? Counsel states it is interest. I will admit that, and I will admit that the figures were taken from the books, but I would like to have counsel explain what the purpose of the offer is.

"Mr. NIEVINSKI: It is for the purpose of showing the interest due on advances and on salaries.

"Mr. ANDERSON: I have no objection to showing what the computation of interest would be at six per cent and at ten per cent.

"Mr. NIEVINSKI: That is all there is here, a statement showing that.

"Mr. ANDERSON: With that reservation I have no objection to its going in."

Whereupon Exhibit No. 6, previously identified, was admitted in evidence, and is hereby included, and will be designated as a part of this statement of evidence.

(Testimony of Alfred T. Carne.)

I have also computed exactly in the same manner as Exhibit 6 the interest on the advances and undrawn salary of Mr. Otto H. Wagner on Petitioner's Exhibit No. 7 for identification. It is based on the books. These are computations and calculations based on the books.

"Mr. NIEVINSKI: I will offer Petitioner's Exhibit No. 7 in evidence at this time, if your Honor please.

"Mr. ANDERSON: I am not offering any objection, naturally, under the understanding I had in regard to Petitioner's Exhibit No. 6, because they are both alike."

Whereupon Exhibit No. 7 previously identified was admitted in evidence, and is hereby included and will be designated as a part of this statement of evidence.

The books of E. Wagner & Son, Inc., for the calendar year 1929 were kept on the accrual basis. [37]

Cross Examination

The entry in the books which I have looked at with reference to salary was made by me shortly after Mr. Wagner came to Seattle. The entry was part of the routine of closing the books. I made an entry of $13,000 salary for each, Mr. E. Wagner and Mr. Otto H. Wagner, for salaries for 1929 from information and directions given me by Mr. Wagner. This was brought out by other details as to machinery bought and contracts and trucks traded

(Testimony of Alfred T. Carne.)

in, the allowance on them, all those things would be gone over personally with me and Mr. Wagner. With reference to interest there is an entry in the books in the sum of $2750, $2250 for Mr. Otto H. Wagner and one of $500. Mr. Otto Wagner said with reference to that, that the officers were entitled to interest on their undrawn salaries. There were two officers, the two Wagners. They owned all the stock. There were no entries in the books that I know of relative to any agreement to pay interest. The amounts of interest shown on the books are the figures given me, and I was told it was based on ten per cent. That was done direct by Mr. Wagner.

MR. OTTO H. WAGNER,

called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

My name is Otto H. Wagner. I reside at Okanogan, Washington, ninety miles north of Wenatchee in the central part of Washington. I was treasurer, secretary and general manager of the petitioner corporation in 1929 and at the present time. The company was first [38] organized in 1924 with principal office at Wenatchee. The plant consisted of a box factory and equipment. There was a small circular saw mill in 1922, but we constructed a box manufacturing factory on Soap Lake Creek in

(Testimony of Otto H. Wagner.)

Okanogan County in 1924. My estimate of the total gross value of the equipment and plant at Okanogan in 1924 is $15,000 to $20,000. I heard Mr. Carne read the salaries as shown by the books from 1924 to 1930. Beginning in 1924 the business was principally lumber. The box manufacturing business was fairly new to us at that time, and we had this small saw mill and we undertook to build this box factory and we had a very small operation in 1924 for various reasons, lack of experience, lack of capital and lack of market, and from that period until 1929, 1930, and 1931, we kept each year enlarging the plant and enlarging our markets for the products of that plant.

The capital stock was owned by E. Wagner and Otto H. Wagner, one-half each. We were the only stockholders. We drew small salaries of $2000 to $4000 a year from 1924 to 1928, inclusive, because this small saw mill enterprise apparently merited no bank credit and it was practically impossible during those years to go to a banker and borrow money for saw mill purposes, and had we drawn a salary such as the work we did justified, we would have eventually embarrassed our company so it could not have operated. The company had other business operation during 1929 at Wenatchee, Washington. It had interests consisting of real estate holdings.

My father was president of the company during the year 1929. He principally had charge of the

(Testimony of Otto H. Wagner.)

Wenatchee operations, handled our [39] real estate and consulted with myself on account of the financial arrangements for the real estate and also the saw mill operations; and on account of these places of business being separated by at least ninety miles he made frequent trips from Wenatchee to Okanogan and I made frequent trips from Okanogan to Wenatchee to consult with each other as to policy and other matters relative to the operation of our two businesses. In connection with the subdivision that the company had in Wenatchee, he had charge of its residence properties which were unprofitable, and undertook to divide them into tracts, one acre, a half acre, a quarter acre and town lots, down to fifty foot lots. He undertook the proposition of making sales of this property, and after having made sales to undertake to finance the building of houses on the lots in order to assist in the sales. In other words, some were sold as tracts and others as lots with a provision there would be a house thereon. And others he just advertised to sell the property. I would say he supervised fifteen houses altogether in 1929. Subdividing those tracts was the only unusual undertaking regarding the real estate operations at Wenatchee. The most unusual undertaking was in regard to the saw mill operation at Okanogan. We had enlarged our plant by that time, and we could foresee a market for our product at that time, so we undertook a double shift, a day shift and a night shift, on our saw mill and box plant.

(Testimony of Otto H. Wagner.)

We commenced that double shift the first day of June 1929. Each shift consisted of ten hours. We ran the saw mill twenty hours per day. At the saw mill end of the business at Okanogan, I had under my [40] care and supervision during 1929 a normal crew during a single shift operation of 100 men, maybe three or four more or three or four less. The double shift would require 160 men at the saw mill.

I devoted all of my time during 1929 to the business of the corporation. I worked during the double shift from 12 to 20 hours and whatever was necessary to try to make that operation successful. Our prior years were not high pressure operations, and I would say that in prior years I only had to devote about half of my hours to the operation of the saw mill and logging. The company had difficulties in financing its affairs during 1929 and prior years. It was under-financed because bankers seemed to take the attitude that loans to saw mills were a poor risk, and would advance no money whatsoever for capital improvement, but did seek to give us nominal sums for pay rolls. The maximum bank credit for payrolls operation during 1929 was $15,000. With reference to these loans, I and my father had to personally endorse the company's notes as individuals in order to get the credit and before we could get any money whatsoever during 1929. That same financial condition existed in the years prior to 1929. Even though we

(Testimony of Otto H. Wagner.)

had had adequate financial assistance in those years prior to 1929, there was the matter of marketing and selling this product. 1929 was our first big year of operation.

There was no minute book of the company in evidence for a long time. The only knowledge I had of the minute book was when father lived on the farm near Wenatchee. This is probably 100 miles northwest of Pasco, and due east of Seattle. This book was the [41] entire minute book, all there ever was. There are minutes of the first meeting of the stockholders of E. Wagner & Son of date March 22, 1924. The by-laws of E. Wagner & Son, Inc., comes next. The minutes of the first meeting of the board of trustees are the next entry, also on March 22, 1924. That appears to be all the meetings recorded in that book. W. Oliver Barr was attorney for us. He is now Judge of the Superior Court of Chelan County. He prepared those minutes. Since those original minutes in March 1924, we kept no minutes of the meetings of the stockholders or trustees of this company at any time. The meetings between myself and my father were usually held at the mill in Okanogan County. I and my father acting as trustees for E. Wagner & Son, had a meeting with reference to salaries at the mill office in Okanogan County early in June, possibly the first week in June 1929. By that time we realized that this double shift and this high pressure was a real undertaking, and we were also fairly

(Testimony of Otto H. Wagner.)

certain by that time that the operation would be successful, and we determined at that time that we, as officers, would be entitled to reasonable compensation for the services we were rendering for this company. We took action at that time and decided that a $10,000 salary would be a reasonable salary for 1929 and following years. My father and I held another meeting along the latter part of September 1929 at Okanogan.

Action was taken with reference to salaries. It was decided that we would each be entitled to a bonus of $3,000 for our services performed in that year. Father and I were the only trustees.

Petitioner's Exhibit No. 2 for identification bears my signa- [42] ture. Our part time bookkeeper, Mr. A. T. Carne, who was on the stand, prepared that tentative return. Some of the information set forth in it was given to Mr. Carne by mail and other by long distance telephone. I can tell it was filed from the face of the return. It says here received March 15, 1930, Washington, D. C. I have no recollection of filing it except it must have been filed because I have my signature on it. It was probably filed at the Wenatchee office. By referring to the notary's signature I see it was signed at Wenatchee before H. E. Jones, Notary Public. The principal reason it was not possible on March 15th to prepare a complete return for the company for the calendar year 1929, was because Mr. E. Wagner

(Testimony of Otto H. Wagner.)

was not in the county at that time. He had been ordered away in the fall of 1929 on account of his health and did not return until the following June, so we were not prepared to make a return on March 15, 1930. And the second reason was that I myself had gone on a vacation that winter and did not return until possibly the middle of February, 1930, and on account of our bookkeeper residing in Seattle, and a part of our *date* being at the mill office in Okanogan County and the balance of the data at Wenatchee, it was impossible to make a proper return by March 15, 1930.

I heard Mr. Carne testify that his duties as far as our company was concerned, for the years 1929 and 1930 and prior years, consisted of closing the books for the respective years and preparing the income tax returns. I gave Mr. Carne by telephone some of the information on which he returned the tentative return, [43] Petitioner's Exhibit No. 2. In that telephone conversation I told him that the 1929 salaries would be $10,000 each and a bonus of $3,000 each. I notice that the tentative return which I hold in my hand, Petitioner's Exhibit No. 2 for identification, has under the heading of deductions, number 12, "Compensation of officers", $6,000. That is the return which I signed. I probably received it at Okanogan on March 15th. Okanogan is ninety miles from Wenatchee. I went down to Wenatchee to have it notarized and I probably turned it in at

(Testimony of Otto H. Wagner.)

the Wenatchee office on account of the shortage of time. I had no time to check the figures on this return. I had always left that to Mr. Carne and assumed his figures were correct. The reasons I did not check any of the figures on that tentative return were because of lack of time, I knew the return was merely tentative, and in order to gain the extension of time.

Whereupon Petitioner's Exhibit No. 2, previously identified, was admitted in evidence without objection, with the respondent reserving the right to substitute a photostatic copy. Said Exhibit No. 2 is hereby included and will be designated as a part of this statement of evidence.

I hold in my hand the corporation income tax return for 1929, being Petitioner's Exhibit 3 for identification. It bears my signature. It does not bear the signature of my father. The footnote says: "E. Wagner is president, but is out of United States so not available for signature". My father left the United States early in October, 1929. He was ordered away by his doctor on [44] account of a breakdown in his health. He returned to the United States the following June, 1930. That final return for the year 1929 was also prepared by Mr. Carne in Seattle. I don't believe I was present during its actual preparation but the data on here was brought to Seattle by me for Mr. Carne. At

(Testimony of Otto H. Wagner.)

that time I again told him what the salaries were in 1929.

With reference to the matter of the allowance of interest on advances made by myself and my father to the corporation and on undrawn salaries, I don't believe there ever was a meeting of the trustees of the corporation. The matter of interest was first decided on my trip to Seattle to see Mr. Carne for the closing of the books for 1929, probably some time in April, 1930.

My father and I made a practice each year of leaving our salaries as officers in the business so the company could be financed. We would draw only sufficient to actually carry on, to actually live on. The rate of interest the company had to pay on the credit extended to it in that vicinity was ten per cent. The corporation did during that same year obtain money in Seattle at eight per cent. We have been able since then to obtain eight per cent in Seattle. We obtained none for less than eight per cent.

In my opinion a salary of $13,000 from this corporation would be a reasonable salary for the services performed by me during the year 1929.

Respondent objected to this evidence of the reasonable value of services rendered to the corporation by Otto H. Wagner. The Member overruled the objection and an exception was allowed the respondent. [45]

(Testimony of Otto H. Wagner.)

The allowance of $13,000 to E. Wagner also would be considered a reasonable compensation for his services for the year 1929. The executive and the administrative employees of the company during the year 1929 were E. Wagner and myself, and we had a bookkeeper at the mill office, who during two months in the summer time had an assistant.

I am included in some respects with other mill operations. From my personal observation in the offices of seven or eight competitors we would usually have at least two for our Wenatchee operations and five at our mill operation in the administrative and executive end of our business. Father and I each took a salary of $10,000 for 1930 under the same resolution we adopted in 1929. Aside from executive duties which I performed during 1929, I had lots of other duties in regard to the company's affairs. Starting from one end and going to the other, personally I went to cruise timber which was owned by the State of Washington, and make application for the purchase thereof, and see that the timber so purchased was brought out; that is, I took general logging crews and operated the logging operations, laid out the logging work, cutting timber and bringing the timber into the saw mill. Then I had supervision of the saw mill and box factory and lumber yard operations. I handled the entire sales end of the business in Okanogan County besides going to Wenatchee and consulting with

(Testimony of Otto H. Wagner.)

Mr. E. Wagner with reference to his real estate operations there, and the sale of box shooks and lumber at Wenatchee. Comparing the amount of work that I did for the company during the prior [46] years when the business had not been worked up to its full extent, I would say that the job in 1929 was at least double to anything I had ever undertaken before. These salaries that I took prior to 1929 were not adequate salaries. They did not compensate me for the work I did during those years. They were too small. With reference to my father and with reference to the salary which I drew there, his salary was just normal.

Whereupon Petitioner's Exhibit No. 3, previously identified, was admitted in evidence. Respondent was granted permission to withdraw Petitioner's Exhibit No. 3 and substitute a photostatic copy. Said Exhibit No. 3 is hereby included and will be designated as a part of this statement of evidence.

Cross Examination.

In 1929 my father was sixty-eight or sixty-nine years old. The state of his health was firm; it was good. He left the country in the early part of October on account of a breakdown in his health. He returned in June, 1930. On direct examination I testified that the same salaries were taken for the year 1930 for both myself and my father. We still drew the same salary. His ship arrived in Vancouver the last part of May, 1930. He was actually

(Testimony of Otto H. Wagner.)

on the ground possibly seven months. Ours being a seasonal operation we cannot determine it by monthly periods. Our business is carried on not to exceed eight months in the year, beginning in April and until we get through in the fall. It lasts generally from April until October to November, which would be our seasonal operation. Father and I owned all the stock of this corporation. We did not declare any dividends or pay dividends during the year 1929. We [47] have never declared or paid any dividends. The reason for the increased salary deduction in 1929 in comparison to 1928 and 1927 and 1926 and 1925 and 1924, was that by the first part of June we could see that our operation that year was going to be a successful one. It was the first year that the corporation made any real money. In other words, we could tell in June that this was the big year. The idea was not that for this reason we would take the profits in view of the fact that we were making a lot of money. The idea was that we would take adequate salaries for what we were doing. Father and I owned all the stock. We controlled the corporation. It was not a matter exactly of convenience for us to take the salaries, it was a matter of justice to ourselves. The basis of the salaries was that we certainly could not continue just to draw a laboring man's salary of $2000.00. We continued up to these years to draw $2400 from force of necessity and to protect the

(Testimony of Otto H. Wagner.)

corporation. The corporation owed me personally in 1929 around $16,000. At the end of 1929 our corporation was indebted to both of us aprpoximately $40,000 but I believe it owed me slightly more than it did E. Wagner. That amount had been accumulated during 1929 and previous years. That included salaries and what we had been able to put in the corporation personally. The corporation borrowed money in 1929 to the extent of $15,000. Father and I actually drew out in 1929 just what we needed to live on. I would say in the neighborhood of $2500 for myself. Relative to the amount I was living on in the years 1924 to 1928, I had other independent income which I could depend on in some years. [48] In 1929 I had income from our ranch at that time, our fruit ranch which I am interested in. I believe there was a small dividend in 1928 but I am not certain as to that.

Relative to the duties of my father, primarily he lived in Wenatchee and his duties there were to transform his unprofitable orchard property into salable town lots and tracts and building thereon houses and cabins in order to make these tracts available and salable. His duties at Wenatchee were to sell box shooks and lumber such as that manufactured at our Okanogan plant, and he would receive lumber at Wenatchee from our plant and purchase it from other local lumber yards for the produc-

(Testimony of Otto H. Wagner.)

tion of these houses and painting, which was called for in their agreement or contract. Besides that he would make frequent trips to the office at Okanogan to confer with me as to the logging policy and saw mill operations and sales of our products, and also consult with me as to what he was doing at the Wenatchee real estate end of the business. I do not recall making any written record or memorandum or notation of the meeting which I had with my father early in June, 1929, with reference to salaries. Its arrangement was just like the transaction of other business, we would talk matters over and come to conclusions. The subject of interest never came up during our discussions, that is, between E. Wagner and myself. There was no agreement of the corporation to pay interest.

Redirect Examination.

With reference to the inquiry as to whether any dividends were paid, there was an unusual happening relative to the company. [49] In August, 1931, we lost our entire plant in a fire. The lumber was partially insured but there was no insurance on the plant or equipment.

We paid our superintendent $3600 in 1929. I believe there was also a $600 bonus at the end of the year, besides a contract to get an interest in the mill property as a bonus. $3600.00 salary, $600.00 bonus and approximately $3000.00 on his contract.

(Testimony of Otto H. Wagner.)

that would total about $7200.00. With reference to the time he put in for the company during 1929 as compared with the amount of time I gave the company during that time, he was merely superintendent and his time was just from shift to shift. In other words, he only worked one shift. I was general manager and was in for both shifts. To compare the time that I as general manager put in during this time and the time my father put in, I would say that the time the superintendent put in would compare about half of what we were putting in. Comparing the responsibility of the superintendent compared with our responsibility for the year 1929, the responsibility of the superintendent amounted to taking charge of the actual saw mill operation and seeing that the box factory made proper boxes. He was a box maker priamrily and that was his job, seeing they were properly manufactured so they could be sold. All the time he put in was approximately one shift, and for that he received approximately $7000.

Aside from the beginning record in the minute book in March, 1924, which minutes our attorney drew, we did not record any meetings at all. [50]

MR. E. WAGNER,

called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination.

My name is E. Wagner. I reside at Wenatchee, Washington. I was seventy-four last February. I am the president of E. Wagner & Son, Inc., and was in 1929. I organized this corporation in 1924. I turned over to the corporation when it was organized in 1924 all of the property I owned. In 1924 the saw mill consisted of a small circular saw mill and a kind of a home made box factory. It was roughly worth about $20,000. We built the saw mill up by improving it every season. I and my son advanced to the company from time to time every cent we could scrape up. The salaries which we did not draw were left with the company and went in to improving the mill. The reason that I and my son drew such small salaries for the years 1924 to 1928, inclusive, was that if we had drawn any more it would have busted the company, and it couldn't exist at all. Relative to the character of the operation in 1929 as compared with the prior years, the value of business and kind of business, I will say that we had improved the mill to such an extent and the business had grown as we had yearly improved, so that we had to put on a double shift the first week in June, 1929. That was the first year we had a double shift in that mill. Those shifts were ten hour shifts and during the four hours be-

(Testimony of Mr. E. Wagner.)

tween the two shifts we repaired machinery, kept the mill up and made repairs that could not be made while the mill was running.

I had charge of this subdivision which my son spoke of down [51] at Wenatchee. In general, my work in connection with that subdivision in 1929 consisted of this: I hired surveyors to lay out the lots and map out acre tracts, half acre tracts, quarter acre tracts and fifty foot lots, and in order to sell those lots I had to build houses. Those people I sold to didn't have the money to build their own houses, so I would make the plans and the specifications according to the means of the prospective purchaser as to what I would build for them, and make up a contract. I had all the way from twenty to thirty men under me in 1929 down in the Wenatchee end of the business. We had at the saw mill end of the business about 150 to 160 men. Besides the work which I did on this subdivision in Wenatchee in 1929, I did work in connection with the mill property, the saw mill itself. I would drive out whenever there was an opportunity to help scout the timber and see where we would buy, and get the cutters started and see they didn't cut over the line, because we would have to pay a heavy fine; if we cut over the line, that is, if we cut over the line we would be accused by the State of taking timber that did not belong to us, and a heavy fine attached. The other work was, I used to run up once a week or sometimes twice a week, go up in the forenoon

(Testimony of Mr. E. Wagner.)

and come back in the afternoon. That is where I ruined my health. I devoted all of my time to our company's business during 1929. Speaking of the Wenatchee office, in the day time I would be out stepping off the lots and stepping off and showing them where the places were, and after dark I would make plans and figure the lumber bill to try and figure out what [52] I could build a house for which would cost $2,000 or $3,000 or maybe only $900. I would do that after dark, by lamp light, and in the day time it took all my time to sell the lots to the customers, prospective customers, where the property is. I recall the work which our superintendent had during 1929. He put in some more time than I put in during 1929. About $15,000 was the maximum credit that our company had. I and my son had to personally endorse all loans that the bank made to the company.

I and my son in 1929 had meetings with reference to our salaries for the years 1929 and subsequent years. A meeting was held about the first week in June, 1929, at Okanogan. We voted for a $10,000 salary apiece for 1929 and subsequent years. Another meeting was held about the first of September, 1929. We voted a $3,000 bonus apiece.

Along in July, 1929, I began to break down. I lost my eyesight in the fall of 1929. The breakdown was caused from driving to Wenatchee over to Okanogan, and where I lost the eye was a Ford coming on at night one evening and blinded me

(Testimony of Mr. E. Wagner.)

with the flare up and I had to stop right there. The cause of my general breakdown was overwork, trying to make things go.

The rate of interest the company was paying on its loans that were made to it during 1929 was ten per cent.

I was acquainted during 1929 with other mill operations in the vicinity, and I had occasion to observe the administrative and executive ends of the business of other mills. The number of officers and employees in the administrative and executive end of [53] those businesses were more than double what we kept. With reference to my income and earnings prior to 1924, I earned from $40,000 to $100,000 in a few months from 1906 to 1918. In the period of a year my earnings would be approximately $40,000, $50,000 and $60,000. I first went into the saw mill business in 1888 in Castle Rock, Washington. With reference to a reasonable salary for 1929, the salary of $10,000 and bonus of $3,000 allowed to me for the work which I did in 1929 was underpay. I was capable of earning more than that in other lines of work. I have earned from $40,000 to $100,000 in seven months.

Cross Examination

I earned between $40,000 and $50,000 a year in prior years, from 1906 until 1917. I guess I was twenty years younger. I could not have gone out in the year 1929 and made $40,000 or $50,000. It was decided to pay $10,000 or to take a salary of $10,000 in 1929 because the work was worth it. The

(Testimony of Mr. E. Wagner.)
corporation paid me $10,000 in cash and credit in 1929. I couldn't say how much cash. I didn't hear my son testify how much he drew. I was too far away from him. If I had been closer I might have heard it.

I was familiar with the condition of the corporation during 1929. It could have paid $10,000 in 1929. It did pay me by check. When the final payments were to be made, I had left the country. My doctor ordered me for a voyage and I was ill. I broke down completely and I left October 1st and the payment was not made before I left. I drew enough to get my steamship ticket, approxi- [54] mately $5,000. When I came back the first week in June, 1930, I drew some more. I drew a thousand dollars at a time. I did not draw all my money out in 1929 because in the spring is our heaviest pay rolls, and we need money, because the biggest business comes in after the apples are sold along in November and December, and so on, but in the spring when we put 150 men or 160 men, or sometimes 125 men to work it varies, and it takes cash twice a month, and we borrow money. The corporation was in a financial position to pay me my money in 1929 and 1930 but we needed the money in the business, to pay 150 laborers, and our bank credits would only allow us $15,000 for the year's operation, and it would be a case then of not running because we have got to have the cash in the business to pay the men. When I left for New Zealand in the first week of October, there was only enough money there to meet the monthly

(Testimony of Mr. E. Wagner.)

pay roll of the mill workers. I drew $5,000 to get my steamship ticket in September of 1929. When I left the corporation owed me the balance of the $10,000. With reference to any agreement that the corporation was to pay me and my son interest on money that belonged to me and my son and had left with the company, we figured we were entitled to interest because we were paying interest to the banks that we borrowed money from. Relative to an agreement or understanding, I suppose you understand how a father and son will talk it over.

Redirect Examination

I returned from the trip the first week in June, 1930. When we borrowed money from the bank we had to pay ten per cent interest [55] and they took it off before they gave us our check. The interest is taken off right then and not at the end of ninety days. They take off the interest beforehand. We get a credit of $9,000 and some odd dollars. The interest was taken off beforehand so that it amounts to more than ten per cent.

MR. OTTO H. WAGNER,

recalled as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Redirect Examination

The reasons why the salaries were not withdrawn for the year 1929 were that in the winter of 1928 and spring of 1929 we purchased lots of new equip-

(Testimony of Otto H. Wagner.)
ment in order to carry out the policy of enlarging our mill plant, and in order to purchase that equipment the bank would not advance one cent for capital investment, which that was, so in order to purchase this equipment at all, we would get it for a few dollars down on a contract and sign notes on the contract to pay out the balance. The only means we had of paying out these contracts for equipment would be from the company's earnings and from the officers' loans. We could not make such loans from any outside source.

The respondent called no witnesses in rebuttal.

Thereupon counsel for both petitioner and respondent stated that they had no further or other evidence to present, and rested their case.

The foregoing is the substance of all the material evidence [56] adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, General Counsel for Respondent, as attorney for the Commissioner of Internal Revenue.

HERMAN OLIPHANT
General Counsel
Counsel for Respondent

The foregoing is the substance of all the material evidence adduced at the hearing before the Board

of Tax Appeals, and the same is approved by the undersigned as attorneys for the petitioner.

A. G. ELDER
CYRIL D. HILL
Attorneys for Petitioner.

Approved and ordered filed this 1st day of Dec., 1936.

(Signed) J. E. MURDOCK
Member

[Endorsed]: Lodged Nov. 30, 1936. Filed Dec. 1, 1936. [57]

Admitted in Evidence Sept. 11, 1934.

PETITIONER'S EXHIBIT 1.

TREASURY DEPARTMENT
Washington
March 12, 1932.

E. Wagner and Son,
Wenatchee, Washington.

Sirs:

You are advised that the determination of your tax liability for the year 1929 discloses a deficiency of $2,670.61, tax and penalty, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing

of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner,
By (signed) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870. [58]

STATEMENT.

IT:E:Aj
PWH-19624-60D

In re: E. Wagner and Son,
Wenatchee, Washington.

Year—1929.
Tax Liability—$3,607.15.
Tax Assessed—$1,063.71.
Deficiency—$2,543.44.
5% Penalty—$127.17.
Total deficiency—$2,670.61.

The report of the internal revenue agent in charge, Seattle, Washington, based upon an investigation of your income tax liability for the year 1929, has been reviewed and accepted as submitted. The method of determining your income tax liability and penalty follows:

Net income as shown by return		$12,670.05
Plus:		
1. Miscellaneous expense disallowed		80.30
2. Sawmill operating expense disallowed		915.55
3. Officers salaries disallowed		20,000.00
4. Interest disallowed		2,750.00
5. Property taxes, year 1928		1,026.43
Total		$37,442.33
Less:		
6. Property taxes, year 1929	$1,320.52	
7. Loss on boiler	275.00	
8. Depreciation understated	3,054.57	4,650.09
Net income as adjusted		$32,792.24

Explanation of Changes

1. Small tools, sawmill, deducted as an expense have been disallowed and restored to plant assets.

2. The correct residual value of discarded equipment charged to sawmill operating expense is $1,083.31, instead of $1,998.86 as shown by the books. [59]

3. Officers salaries in the amount of $20,000.00 have been disallowed since they were not paid or incurred within the taxable year.

4. Interest in the amount of $2,750.00 has been disallowed since it did not accrue within the taxable year.

5. This represents an adjustment of accrued taxes in conformity with General Counsel Memorandum 6667, VIII-35, 4324.

6. See item 5.

7. The loss on boiler is $275.00 for the reason that the residual value was $275.00 when discarded.

8. Depreciation has been allowed in the amount of $17,924.05, whereas only $14,869.48 was claimed on the return.

TENTATIVE RETURN.

Form 1120
TREASURY DEPARTMENT
Internal Revenue Service

(Collector's Stamp)

CORPORATION INCOME TAX RETURN
For Calendar Year 1929

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1930

Page 1 of Return

File Code

Serial Number

(Candidate's Stamp)

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

E. Wagner Son
(Name)

(Street and number)

Wenatchee, Wash.
(Post office and State)

Cash Check M. O. Cert. of Ind.
First Payment

$

Carded

As

Date of Incorporation

Under the Laws of what State or Country Washington

Nature of Business Livestock Operations

Is This a Consolidated Return of Two or More Corporations? No

GROSS INCOME			
1 Gross Sales from Trading or Manufacturing, Less Returns and Allowances			172 680 71
2 Less Cost of Goods Sold:			
(a) Inventory at beginning of year	17 050 00		
(b) Merchandise bought for sale	1 773 28		
(c) Cost of manufacturing or producing goods (From Schedule A)	169 260 55		
(d) Total of lines (a), (b), and (c)	188 083 83		
(e) Less inventory at end of year	29 340 00		158 743 83
3 Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)			15 942 88
4 Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income):			
(a) Share of Pool Sales			3 721 53
(b)			
(c)			50
5 Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds			
6 Rents			
7 Royalties			
8 Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule B)			
9 Dividends on Stock of Domestic Corporations			
10 Other Income (including dividends received on stock of foreign corporations). (State nature of income):			
(a)			
(b)			
(c)			
TOTAL INCOME IN ITEMS 3 TO 10			20 334 41
DEDUCTIONS			
11 Compensation of Officers (From Schedule C)			6 000 00
12 Rent on Business Property			
13 Repairs (From Schedule D)			
14 Interest			67 977
15 Taxes (From Schedule E)			
16 Losses (From Schedule F)			
17 Bad Debts (From Schedule G)			
18 Dividends (From Schedule H)			
19 Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)			11 150 00
20 Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 21)			
21 Other Deductions Not Reported Above. (Explain below, or on separate sheet):			
(a) Salaries and wages. (Not included in Item 2, 12, or 14 above)			
(b) Net Loss for prior year. (Submit schedule)			
(c)			
(d)			
(e)			
(f)			
TOTAL DEDUCTIONS IN ITEMS 12 TO 22			17 829 77
NET INCOME (Item 11 minus Item 23)			2 834 64

U. S. BOARD OF TAX APPEALS
DIV. 16 DOCKET NO. 61864
ADMITTED IN EVIDENCE
SEP 11 1934
PETITIONER'S EXHIBIT
RESPONDENT'S

RECEIVED
3/15
Deputy

COMPUTATION OF TAX

24 Net Income (Item 24 above)	$	2 834 64	28. Income Tax (12% of Item 27) $ NO
25 Less Credit of $3,000 (for a domestic corporation having a net income of less than $26,360)		3 000 00	29. If net income of domestic corporation is less than $25,360, enter the amount over $25,000
26 Balance (Item 25 minus Item 26)	$	0 00	30. Total Tax (Item 28 plus Item 29) $ TAX PAYABLE
27 Less: Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)			
Income Tax Paid to a Foreign Country or U. S. possession by a domestic corporation (see Inst. 27)			
31 Balance of Tax (Item 30 minus Items 31 and 32)			$

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

Computation of Tax

Net income as adjusted	$32,792.24
Less:	
Credit	None
Balance subject to tax	$32,792.24
Income tax at 11%	$ 3,607.15
Total tax assessable	$ 3,607.15
Tax previously assessed	1,063.71
Deficiency in tax	$ 2,543.44
Plus:	
5% penalty for negligence asserted under the provisions of section 293(a) of the Revenue Act of 1928	127.17
Total	$ 2,670.61

[60]

The understatement of tax for the year 1929 is attributable to negligence as defined in the regulations and under the provisions of section 293(a) of the Revenue Act of 1928, and a penalty of 5% of the deficiency attaches. The 5% penalty is included in the above assessment and the interest, due in accordance with the law, will be computed by this office and demanded by the collector at the time you are called upon to pay the tax.

Payment should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him. [61]

Page 2 of Return SCHEDULE K—BALANCE SHEETS (See Instruction 43)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
ASSETS				
1. Cash		$ 5,814.68		$ 12,852.50
2. Notes receivable		31,844.73		31,844.73
3. Accounts receivable	$	3,512.41	$	8,638.40
Less reserve for bad debts				
4. Inventories:				
Raw materials—Stumpage	$ 3,500.00		$ 7,779.33	
Work in process—Logs on Hand	7,210.49		4,200.00	
Finished goods—Lumber on Hand	9,840.00		25,140.00	
Supplies—Lumber at Wenatchee	1,884.15		1,884.15	
		22,434.64		39,003.48
5. Investments (nontaxable):				
Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	$		$	
Securities issued under the Federal Farm Loan Act, or under such Act as amended				
Obligations of the United States or its possessions				

SCHEDULE K—BALANCE SHEETS—Continued

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
6. Other investments:				
Stocks of domestic corporations	$		$	
Bonds of domestic corporations				
Stocks and bonds of foreign corporations				
All other investments or loans				
7. Deferred charges:				
Prepaid insurance	$		$	
Prepaid taxes				
All other				
8. Capital assets:				
Land		34,498.17		34,498.17
Buildings	$ 22,707.13		$ 22,707.13	
Machinery and equipment	87,217.15		87,217.15	
Furniture and fixtures	596.50		596.50	
Delivery equipment				
	$110,520.78		$110,520.78	
Less reserves for depreciation	37,415.62	73,105.16	48,565.62	61,955.66

SCHEDULE K—BALANCE SHEETS—Continued

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
9. Patents				
10. Good will				
11. Other assets (describe fully):				
	$		$	
12. Total Assets		$171,209.79		$188,792.44
LIABILITIES				
13. Notes payable (less than one year)		$ 450.00		$ 450.00
14. Accounts payable		5,904.67		20,652.68
15. Bonds and notes (not secured by mortgage)				
16. Mortgages (including bonds and notes so secured)				
17. Accrued expenses:				
Payroll	$ 3,004.68		$ 3,004.68	
Taxes	925.00		925.00	

SCHEDULE K—BALANCE SHEETS—Continued

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
All other	925.34	4,855.02	925.34	4,855.02
18. Other liabilities (describe fully): Deposits	470.00		470.00	
Stock subscriptions	7,985.62		7,985.62	
Contracts payable	8,187.22		8,187.22	
Mortgages payable	4,500.00		4,500.00	
Loans from officers	11,852.81	32,995.65	11,852.81	32,995.65
Reserve for tracts sold		21,900.00		21,900.00
19. Capital stock:				
Preferred stock (less stock in treasury)	$		$	
Common stock (less stock in treasury)	99,000.00	99,000.00		99,000.00
20. Surplus	$ 3,803.16		$ 6,104.45	
21. Undivided profits	2,301.29	6,104.45	2,834.64	8,939.09
22. Total Liabilities		$171,209.79		$188,792.44

Remarks .....

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Tacoma, Washington

Feb. 24, 1930

E. Wagner & Son, Inc.,
Okanogan,
Wash.

An extension of 60 days is hereby granted within which to file your 1929 income tax return.

This extension is expressly conditioned upon compliance with the following instructions:

1. The filing on or before March 15, 1930, of a tentative return accompanied by a remittance covering one-fourth of the estimated tax due thereon.

2. One copy of this extension must be attached to the testative return and one copy must be attached to the complete return.

3. If the complete return shows a greater tax to be due than the estimated tax set forth on the tentative return, and one-fourth of the correct tax was not paid on or before March 15th, then interest on the deficiency in the first installment of the correct tax according to the complete return must be paid, which interest is at the rate of 6% per annum and dates from March 15, 1930, up to the date of the expiration of this extension, or to the date of the payments of such deficiency, whichever is earlier.

This extension does not apply to annual information returns, Forms 1096 and 1099, and such returns

must be filed with the Collector on or before February 15, 1930, or they will be delinquent.

Respectfully,

ROBERT H. LUCAS,
Commissioner

By BURNS POE,
Burns Poe, Collector

EMB:EM [64]

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

[Not filled in.]

QUESTIONS

KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction —excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufac-

ture. State nature of structures built, materials used, or kind of installations. E1.—Transportation —rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or

install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation)

.....

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation).....

.....

AFFILIATIONS WITH OTHER CORPORATIONS

See Instruction 38

4. Is this a consolidated return of two or more corporations? ..... If so, procure from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return. See Article 12 (c) and (d), Regulations 75.

5. Did the corporation file a consolidated return for the preceding taxable year? .....

PREDECESSOR BUSINESS

6. Did the corporation file a return under the same name for the preceding taxable year? ..... Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? ..... If answer is "yes," give name and address of each predecessor business, and the date of the change in entity. .....

.....

.....

Upon such change were any asset values increased or decreased? ..... If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN

7. Is this return made on the basis of actual receipts and disbursements? ..... If not describe fully what other basis or method was used in computing net income. Accrual.

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock. Cost.

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

.....

.....

The corporation's books are in case of.....

Located at .....

[65]

Page 4 of Return

SCHEDULE A—COST OF MANUFACTURING OR PRODUCING GOODS (See Instruction 2)

Items	Amount
Salaries and wages	$116,276.60
Material and supplies	2,856.94
Expenses	29,661.81
	148,795.35

SCHEDULE B—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

(Not Filled In)

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 12)

1. Name of Officer	2. Official Title	3. Time Devoted to Business	Shares of Stock Owned 4. Common	5. Preferred	6. Amount of Compensation (Enter as Item 12)
E. Wagner	Pres.-Treas.	All	50%	.....	$3,000.00
O. H. Wagner	V. P. Secy.	All	50%	.....	3,000.00

SCHEDULE D—COST OF REPAIRS (See Instruction 14)
(Not Filled In)

SCHEDULE E—TAXES PAID (See Instruction 16)
(Not Filled In)

SCHEDULE F—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 17)
(Not Filled In)

SCHEDULE G—BAD DEBTS (See Instruction 18)
(Not Filled In)

SCHEDULE H—DIVIDENDS DEDUCTIBLE (See Instruction 19)
(Not Filled In)

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 20)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of March 1, 1913, Whichever Greater (Exclusive of Land)	Amount of Depreciation Charged Off 6. Previous years	7. This year
Mill Buildings—Lumber.....	1924-5	New	10 Years	$22,703.13	$	$ .....
Machy. and Equipment.....	1924-8	New and Used	"	87,217.15	37,415.62	11,150.00
Office Furn. and Eqpt.....	"	"	"	596.50	.....	.....

AFFIDAVIT.

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

.....

(Corporate Seal) President.

OTTO H. WAGNER

Treasurer.

Sworn to and subscribed before me this 15 day of March, 1930.

W. E. JONES, Notary Public.

(Notarial Seal)

Attach a separate sheet if any of the above schedules do not provide sufficient space.

Form 1120
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Auditor's Stamp)

CORPORATION INCOME TAX RETURN
For Calendar Year 1929

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1930

Extension Granted 5/1/30

Page 1 of Return

File Code 753

Serial No. 5

PRINT PLAINLY. CORPORATION'S NAME AND BUSINESS ADDRESS

E. Wagner & Son
(Name)

Wenatchee Wash
(Street and number)
(Post office and State)

Date of Incorporation April 1, 1922

Under the Laws of what State or Country Washington

Kind of Business Saw Mill Operations

Is This a Consolidated Return of Two or More Corporations? No

INTERNAL REVENUE AGENT RECEIVED JUN 1 1931 SEATTLE DIVISION

DIST. WASHINGTON MAY 10 1930

MAY 10 1930 TAX $ 1066.37 PAID 262.55 Bal. $ 803.82 DEPUTY (FOR) Collector. Cash, M. Ord. Cert. of Ind. Post Payment $ Credited As Washington

DOCKET 63245 SEP 11 1934 EXHIBIT 3 PETITIONER'S RESPONDENT

SEC. 274 (d) REV. ACT OF 1926 ASSESSMENT

GRANTED SEP 7 1934 REVERSED BY U.S. BOARD OF TAX APPEALS

GROSS INCOME

1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances		$ 209 141 69	
2. Less Cost of Goods Sold:			
(a) Inventory at beginning of year	$ 17 050 49		
(b) Merchandise bought for sale	1 773 28		
(c) Cost of manufacturing or producing goods (From Schedule A)	156 418 21		
(d) Total of lines (a), (b), and (c)	175 241 98	+	
(e) Less inventory at end of year	37 119 33		
4. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)	2,543.44 127.17	$ 71 019 04	
5. Gross Profit from Operations Other Than Trading or Manufacturing			
(a) Store & Boarding House		1 276 64	
(b) Ranch Operations		471 51	
(c) Miscellaneous Total 6		792 90	
5. Interest on Bank Deposits, Notes, Mortgages and Corporation Bonds			
6. Rents Audited by Eddy Unit No.			
7. Royalties			
8. Profit from Sale of Real Estate, Stocks, Bonds and other Capital Assets (From Schedule B)		984 33	
9. Dividends on Stock of Domestic Corporations			
10. Other Income (including dividends received on stock of foreign corporations). (State nature of income):			
(a)			
(b)			
(c)			
11. TOTAL INCOME IN ITEMS 3 TO 10			$ 74 642 42

DEDUCTIONS

12. Compensation of Officers (From Schedule C)	$ 2 000 00	
13. Rent on Business Property		
14. Repairs (From Schedule D)	11 956 24	
15. Interest	4 759 53	
16. Taxes (From Schedule E)	1 026 43	
17. Losses (From Schedule F)		
18. Bad Debts (From Schedule G)		
19. Dividends (From Schedule H)		
20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule D)	14 849 48	X
21. Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 11)		
22. Other Deductions Not Reported Above. (Explain below, or on separate sheet):		
(a) Salaries and wages. (Not included in Item 2, 12, or 14 above)		
(b) Net Loss for prior year. (Submit schedule)	2 223 56	
(c) Fire Expenses	1 137 11	
(d) Traveling Expenses		
(e)		
(f)		
23. TOTAL DEDUCTIONS IN ITEMS 12 TO 22		$ 61 972 37
24. NET INCOME (Item 11 minus Item 23)		$ 12 670 05

RECEIVED WITH INCOME TAX DIVISION STATE OF WASHINGTON SEP 10 1930 TACOMA, OFFICE

COMPUTATION OF TAX

25. Net Income (Item 24 above)	$ 12 670 05	28. Income Tax (13½ of Item 27)	$ 1063 71
26. Less Credit of $3,000 (for a domestic corporation having a net income of less than $25,360)	3 000 00	29. If net income of domestic corporation is less than $25,360, enter the amount over $25,000	
27. Balance (Item 25 minus Item 26)	$ 9 670 05	30. Total Tax (Item 28 plus Item 29)	$ 1063 71
31. Less: Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)		$ 1066 37 - 3% 32	266
32. Income Tax Paid to a Foreign Country or U. S. possession by a domestic corporation (see Inst. 27)			1066 37
33. Balance of Tax (Item 30 minus Items 31 and 32)			$ 1063 71

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

SCHEDULE K—BALANCE SHEETS (See Instruction 43)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
ASSETS				
1. Cash		$ 5,814.68		$ 12,852.50
2. Notes receivable		31,844.73		8,108.92
3. Accounts receivable		3,512.41		8,089.14
Contracts receivable				36,391.01
Less reserve for bad debts				
4. Inventories:				
Raw materials—Stumpage	$ 3,500.00		$ 7,779.33	
Work in process—Logs on Hand	7,210.49		4,200.00	
Finished goods—Lumber on Hand	9,840.00		25,140.00	
Supplies—Lumber at Wenatchee	1,884.15			
		22,434.64		37,119.33
5. Investments (nontaxable):				
Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	$		$	
Securities issued under the Federal Farm Loan act, or under such Act as amended				

SCHEDULE K—BALANCE SHEETS—Continued

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
Obligations of the United States of its possessions				
6. Other investments:				
Stocks of domestic corporations	$		$	
Bonds of domestic corporations				
Stocks and bonds of foreign corporations				
All other investments or loans				
7. Deferred charges:				
Prepaid insurance	$		$	
Prepaid taxes				
All other				
8. Capital assets:				
Land		34,498.17		34,283.66
Buildings	22,707.13		30,322.72	
Machinery and equipment	88,217.15		114,286.33	
Furniture and fixtures	596.50		763.95	
Delivery equipment				
	$110,520.78		$145,373.00	

SCHEDULE K—BALANCE SHEETS—Continued

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
Less reserves for depreciation	37,415.62	73,105.16	50,659.52	94,713.48
9. Patents				
10. Good will				
11. Other assets (describe fully):	$		$	
12. Total Assets		$171,209.79		$231,558.04
LIABILITIES				
13. Notes payable (less than one year)		$ 450.00		$ 3,604.74
14. Accounts payable		5,904.67		2,747.07
15. Bonds and notes (not secured by mortgage)		11,852.81		50,706.45
16. Mortgages (including bonds and notes so secured)		4,500.00		3,500.00

SCHEDULE K—BALANCE SHEETS—Continued

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
17. Accrued expenses:				
Interest	$ 630.00		$ 630.00	
Taxes	925.00		925.00	
All other	3,300.02	4,855.02	1,703.17	3,258.17
18. Other liabilities (describe fully):				
Deposits on tracts	470.00			
Contracts payable	8,187.22		8,032.11	
Stock subscriptions	7,985.62	16,642.84	8,750.00	16,782.11
Reserve for tracts sold		21,900.00		33,185.00
19. Capital stock				
Preferred stock (less stock in treasury)	$		$	
Common stock (less stock in treasury)		99,000.00		99,000.00
20. Surplus	$ 3,803.16		$ 6,104.45	
21. Undivided profits	2,301.29	6,104.45	12,670.05	18,774.50
22. Total Liabilities		$171,209.79		$231,558.04

Remarks .....

Page 3 of Return

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS.

(Not Filled In)

QUESTIONS.

KIND OF BUSINESS.

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—

Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.) State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical services. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; con-

cerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation) .....

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation) .....

.....

.....

.....

.....

AFFILIATIONS WITH OTHER CORPORATIONS.

See Instruction 38.

4. Is this a consolidated return of two or more corporations? ..... If so, procure from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return. See Article 12 (c) and (d), Regulations 75.

5. Did the corporation file a consolidated return for the preceding taxable year? .....

PREDECESSOR BUSINESS.

6. Did the corporation file a return under the same name for the preceding taxable year? .....

Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? ..... If answer is "yes," give name and address of each predecessor business, and the date of the change in entity. .....

.....

.....

Upon such change were any asset values increased or decreased? .....

If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN.

7. Is this return made on the basis of actual receipts and disbursements? .....

If not, describe fully what other basis or method was used in computing net income. Accrual.

VALUATION OF INVENTORIES.

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock. Cost or Market, whichever is lower.

LIST OF ATTACHED SCHEDULES.

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the cor-

poration should be placed on each separate schedule accompanying the return.

.....

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.....

The corporation's books are in care of.....

Located at ..... [69]

(See Instruction 2)

Page 4 of Return SCHEDULE A—COST OF MANUFACTURING OR PRODUCING GOODS

Items	Amount	Items	Amount (Enter as Item 2c)
Salaries and wages	$108,725.18		$
Material and supplies	43,221.28		
Misc. Expenses	4,471.75		
	$156,418.21		

SCHEDULE B—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC.
(See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Allowable Since Acquisition	5. Cost or Value as of March 1, 1913, Whichever Greater	6. Subsequent Improvements	7. Net Profit (Enter as Item 8)
Okanogan Ave. Lots	4/1/24	$1,325.00	$	$ 340.67		$ 984.33

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 12)

1. Name of Officer	2. Official Title	3. Time Devoted to Business	Shares of Stock Owned 4. Common	Shares of Stock Owned 5. Preferred	6. Amount of Compensation (Enter as Item 12)
E. Wagner	Pres.-Treas.	All	50%		$13,000.00
O. H. Wagner	V. P. Secy.	All	50%		13,000.00

SCHEDULE D—COST OF REPAIRS
(See Instruction 14)

1. Items	2. Amount (Enter as Item 14)
Salaries and wages	$ 5,530.09
Parts, etc.	6,426.17
	$11,956.26

SCHEDULE E—TAXES PAID
(See Instruction 16)

1. Items	2. Amount (Enter as Item 16)
Taxes, Mill	$ 441.74
Taxes, Wenatchee	584.69
	$1,026.43

SCHEDULE F—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 17)
(Not Filled In)

SCHEDULE G—BAD DEBTS
(See Instruction 18)
(Not Filled In)

SCHEDULE H—DIVIDENDS DEDUCTIBLE
(See Instruction 19)
(Not Filled In)

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 20)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of March 1, 1913, Whichever Greater (Exclusive of Land)	Amount of Depreciation Charged Off 6. Previous years	7. This year
Mill Bldgs.—Lumber	1924-5	New	10 Years	$ 30,322.72	$	$ .....
Machinery & Equipment	1924-9	New & Used	"	114,286.33)	36,290.04	14,869.48
Office Furniture & Equipment	"	"	"	763.95)	.....	.....

AFFIDAVIT.

We the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

.....

President.

[Corporate Seal] OTTO H. WAGNER

V. P. and Treasurer.

Sworn to and subscribed before me this 9th day of May, 1930.

[Notarial Seal] HENRY J. KERN

Notary Public.

A-9. E. Wagner is president, but is out of U. S. so not available for signature.

Attach a seperate sheet if any of the above schedules do not provide sufficient space. [70]

J 147

1928			General
Dec. 31	Profit and loss	2,980.58	
	Taxes		756.58
	Advertising		17.01
	Legal Expenses		146.30
	Office Expenses		640.82
	Office Salary		600.00
	Traveling Expenses		819.87
	DECEMBER 31, 1929		
	(Payroll) T. M. Operations	764.38	
	Stock Subscriptions		764.38
	Amt. due C. A. Hayden		
	Cr. to his stock acct.		
	Depreciation	14,869.48	
	Res. for Depreciation		14,869.48
	To set up depreciation for year @ 10%		
	Officers Salaries	26,000.00	
	E. Wagner Salary a/c		13,000.00
	O. H. Wagner Salary a/c		13,000.00
	Machy. & Eqpt.		500.00
	Power House	300.00	
	Res. for Depr.	200.00	
	Boiler from Biles Coleman J 77 Obsolete		

Admitted in evidence Sept. 11, 1934. Petitioner's Exhibit 5. [71]

J 148

DECEMBER 31, 1929

General

		Dr.	Cr.
Interest		2,750.00	
E. Wagner			500.00
O. H. Wagner			2,250.00
Interest accrued on loans from officers			
Marbod Fire Insce.		1,000.00	
Marbod Contract			917.75
Profit & Loss			82.25
Proceeds of fire insurance on Marbod house destroyed by fire.			
Ranch Operations		1,884.15	
Cost of Production		20,550.49	
Inventory			22,434.64
To charge Cost of Production [Illegible] with Jan. 1, 1929. Inventory.			
Inventory		37,119.33	
Cost of Production			37,119.33
To set up invy. as of 12/31/29.			
Logs	4,200.00		
Lumber	25,140.00		
Stumpage	7,779.33		
Mill Sales	Lumber	44,283.58	
"	Shook	171,586.18	
"	Wood	3,961.33	
Mill Returns			219,831.09
Store		1,376.64	
Mill Returns			1,376.64

[72]

J 149

DECEMBER 31, 1929

General		
Cost of Shook Sales	17,214.63	
Lumber & Shook Dely		4,109.91
Wood Delivery		2,415.32
Freight on Lumber		8,365.30
Discount (Mill)		2,324.10
Cost of Production	174,981.17	
Shook Bot for Resale		1,773.28
Lumber Purchases		17,642.50
Logging		30,225.16
Mill Operating Exes		31,789.98
Mill Supplies		14,915.99
Factory Expenses		26,257.58
Log Purchases		7,162.79
Truck Operation		1,526.58
Yard Expense		8,912.50
Power House		3,488.15
Repairs to Equipment		11,956.26
Industrial Ins. Med Aid		2,924.51
Insurance Fire		1,094.67
Taxes		441.74
Office Expenses		~~2,223.56~~
Traveling Expenses		~~1,137.11~~
Depreciation		14,869.48
Mill Returns	17,214.63	
Cost of Sales		17,214.63
Income Misc. Truck hire	515.90	
Mill Returns		515.90

[73]

J 150

DECEMBER 31, 1929

Ranch Returns	1,474.06	
Fifth Street Payroll		240.35
" " Water System		649.02
Taxes		584.69
Inventory		~~1,884.15~~
Ranch Operations	3,717.80	
Ranch Returns		3,717.80
Legal Expenses	304.40	
Advertising	164.30	
Insurance	5.00	
Office Expense (Tel.)	1.02	
Cost of Production (Tools)	80.30	
Expenses "Misc."		555.02
Sale of Capital Assets	984.33	
Profit & Loss		984.33
Profit & Loss	452.57	
Rental		452.57
Profit & Loss	115.13	
Ranch Returns		115.13
Profit & Loss	4,759.53	
Interest Expense		4,759.53

[74]

E. WAGNER

1929		Amount	Interest @ 6%	Interest @ 10%
Jan. 1	Balance	5,432.57	27.16	
Feb. 1	"	5,006.39	25.03	
Mar. 1	"	5,065.39	25.33	
Apr. 1	"	4,908.71	24.54	
May 1	"	1,616.49	8.08	
Jun. 1	"	1,526.79	7.63	
July 1	"	1,539.92	7.70	
Aug. 1	"	1,441.30	7.21	
Sep. 1	"	1,468.68	7.34	
Oct. 1	"	1,569.93	7.85	
Nov. 1	"	(113.83)		
Dec. 1	"	(43.83)		
			147.37	245.62
July 1	Salary (Int. fig. to 12/31)	5,000.00	150.00	
Aug. 1	" "	833.33	20.85	
Sep. 1	" "	833.33	16.68	
Oct. 1	" "	833.34	12.48	
Nov. 1	" "	833.33	8.34	
Dec. 1	" "	833.33	4.17	
Dec. 31	" "	833.34		
		10,000.00	212.52	354.20
Oct. 1	Bonus (Int. to 12/31)	3,000.00	45.00	75.00
			404.89	674.82

Admitted in evidence Sept. 11, 1934. Petitioner's Exhibit 6.

Marked for identification Sept. 11, 1934. Petitioner's Exhibit 6. [75]

1929		Amount	Interest @ 6%	Interest @ 10%
Jan. 1	Balance	16,096.57	80.48	
Feb. 1	"	16,096.57	80.48	
Mar. 1	"	23,238.16	116.19	
Apr. 1	"	23,238.16	116.19	
May 1	"	20,012.72	100.06	
Jun. 1	"	20,012.72	100.06	
July 1	"	20,012.72	100.06	
Aug. 1	"	20,012.72	100.06	
Sep. 1	"	20,012.72	100.06	
Oct. 1	"	12,512.72	62.56	
Nov. 1	"	12,512.72	62.56	
Dec. 1	"	12,512.72	62.56	
			1,081.32	1,802.20
July 1	Salary (Int. to 12/31)	5,000.00	150.00	
Aug. 1	"	833.33	20.85	
Sep. 1	"	833.33	16.68	
Oct. 1	"	833.34	12.48	
Nov. 1	"	833.33	8.34	
Dec. 1	"	833.33	4.17	
Dec. 31	"	833.34		
		10,000.00	212.52	354.20
Oct. 1	Bonus Int. to 12/31	3,000.00	45.00	75.00
			1,338.84	2,231.40

Admitted in evidence Sept. 11, 1934. Petitioner's Exhibit 7.

Marked for identification Sept. 11, 1934. Petitioner's Exhibit 7. [76]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination

(b) Answer of the respondent

(3) The findings of fact and opinion of the Board of Tax Appeals, and the opinion of the Honorable Stephen J. McMahon.

(4) The decision of the Board. [77]

(5) The petition for review, filed by the petitioner in the above cause.

(6) The statement of evidence with Exhibits 1, 2, 3, 5, 6 and 7 attached thereto.

(7) This Praecipe.

(Sgd) ANDREW G. ELDER
(Sgd) CYRIL D. HILL
Attorneys for Petitioner,
1261 Dexter Horton Building,
Seattle, King County, Washington.

Personal service of the foregoing Praecipe, together with a copy of the Statement of Evidence mentioned therein, is hereby acknowledged this 30th day of November, 1936.

HERMAN OLIPHANT
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

[Endorsed]: Filed Dec. 3, 1936. [78]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 78, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of December, 1936.

[Seal] B. D. GAMBLE

Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 8415. United States Circuit Court of Appeals for the Ninth Circuit. E. Wagner and Son, Incorporated, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed December 19, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8415

In the United States Circuit Court of Appeals for the Ninth Circuit

E. WAGNER AND SON, INCORPORATED, A CORPORATION
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

JAMES W. MORRIS,
Assistant Attorney General.

SEWALL KEY,
NORMAN D. KELLER,
LOUISE FOSTER,
Special Assistants to the Attorney General.

INDEX

CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 8415

E. WAGNER AND SON, INCORPORATED, A CORPORATION, PETITIONER

v.

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ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 12–28), which is unreported.

JURISDICTION

This petition for review involves income taxes in the amount of $1,333.44, and is taken from a decision of the Board of Tax Appeals entered July 6, 1936 (R. 28). The case is brought to this Court on a petition for review filed October 5, 1936 (R.29–34), pursuant to the provisions of Sections 1001,–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9,

109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTIONS PRESENTED

1. Whether there is any substantial evidence to support the Board's finding as to the amount which the petitioner may deduct for compensation allowed to its two officers during 1929.

2. Whether the petitioner may deduct the sum of $2,750 claimed as interest accrued on sums of money which were left with the petitioner by its officers during 1929.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, 28–30.

STATEMENT

The facts as found by the Board of Tax Appeals are as follows (R. 13–15):

The petitioner is a corporation of the State of Washington. At all times material to this proceeding, E. Wagner and his son, Otto H. Wagner, owned all of its stock in equal proportions. The former was president and the latter was secretary, treasurer, and general manager. They were also trustees or directors and devoted their entire time to the management of the petitioner's business. The petitioner's books were kept on an accrual basis (13).

E. Wagner and Otto H. Wagner held two meetings during 1929 for the purpose of considering the

compensation due them as petitioner's officers. They decided in June 1929 that they should receive an annual salary of $10,000 for that and subsequent years. They decided in September 1929 that they should each receive a bonus of $3,000 for services performed for 1929. No minutes or other written records were made of the action taken at these meetings (R. 13).

After the end of the year the petitioner in closing its books for 1929 made entries under the date of December 31, 1929, debiting officers' salaries in the amount of $26,000 and crediting E. Wagner with $13,000 and Otto H. Wagner also with that amount. The petitioner claimed a deduction in its return on account of compensation of its officers in the amount of $26,000. The Commissioner disallowed $20,000 of that amount (R. 13).

E. Wagner and Otto H. Wagner made loans to the petitioner prior to and during 1929, and in addition to those loans they left with the petitioner parts of their salaries for the years prior to 1929. Interest for the year 1929 on those amounts, computed at the rate of 6 per cent, amounts to $1,228.69. E. Wagner and Otto H. Wagner did not withdraw any of the salary or bonus authorized by the petitioner for the year 1929.[1] They did not have any meetings with reference to the allowance by petitioner of interest on any of the loans which they

[1] This statement may not be correct, as it appears that E. Wagner withdrew part of his salary. (See R. 60–61.)

made to it or the undrawn salaries or bonuses, nor did they as individuals ever enter into any agreement with the petitioner respecting the allowance or payment of interest thereon (R. 14).

The determination of the petitioner to allow interest on the amounts just referred to was first made in April 1930, when its books were being closed for the year 1929. At that time the petitioner made entries under date of December 31, 1929, debiting interest in the amount of $2,750 with the explanation that this was "interest accrued on loans from officers." It also credited E. Wagner with interest in the amount of $500 and Otto H. Wagner in the amount of $2,250. In its return for the year 1929, the petitioner claimed a deduction for interest in the amount of $4,759.53. The Commissioner disallowed $2,750 of this amount (R. 14–15).

As to the deduction for compensation to the officers, the Board stated that a reasonable allowance for salaries or other compensation for personal services actually rendered to the petitioner during the year 1929 is $4,000 in the case of E. Wagner and $10,000 in the case of Otto H. Wagner (R. 14). It accordingly held that the amounts claimed in excess of these sums should not be allowed as a deduction (R. 16).

As to the amount of interest to be deducted, the Board held that the petitioner failed to prove that it was entitled to deduct any larger amount than

that allowed by the Commissioner and accordingly limited the deduction to the amount of $2,009.53 (R. 16–17). It decided that there was a deficiency due in the amount of $1,333.44 (R. 28).

SUMMARY OF ARGUMENT

The Board of Tax Appeals properly refused to allow the petitioner to take a deduction for sums credited on its books to its two officers as bonuses for the year 1929 and for a portion of the sum credited to E. Wagner as salary for that year. The question presented is one of fact and as there is substantial evidence to support the Board's decision it should be affirmed.

The facts show that each of the officers had equal stock holdings in the company and that salaries and bonuses allowed them in 1929 were equal in amount. Such sums were large when compared with the profits of the company and were also excessive when compared with the compensation credited to them in former years when their duties were not materially different. The record shows further that no dividends have ever been paid although profits were realized. Under these circumstances, it is clear that the sums credited to the petitioner's officers were in fact a distribution of profits and were excessive. Accordingly, the amounts in question do not meet the statutory requirement of a reasonable allowance for services actually rendered and the deduction should be limited to the amounts allowed by the Board.

The Board also correctly refused to allow the petitioner to take a deduction for interest in the amount of $2,750 which it claimed was due to its two officers by reason of the fact that they had not withdrawn the full amount of their salaries during 1929 and prior years, but had left such amounts with the petitioner. The facts show that there was no agreement to pay any interest on the sums left with the petitioner in 1929 and it was not decided that an item for interest should be set up on the petitioner's books until April, 1930, when the petitioner's income tax return was being made up. It is evident that the petitioner's officers could have withdrawn their money at any time they wished to do so, and, although such sums may have been used by the petitioner, they did not constitute loans in the ordinary sense and certainly the petitioner is not entitled to take a deduction for interest which it never contracted to pay and which was allowed merely as an afterthought.

ARGUMENT

I

The Board's finding as to what constituted reasonable compensation for petitioner's officers is supported by substantial evidence and should be sustained

On its income tax return for 1929, the petitioner claimed a deduction of $26,000 on account of salaries and business accrued on its books as due to its two officers. After consideration the respond-

ent determined that the bonuses of $3,000 to each of the officers should be disallowed and that the allowance for salaries should be reduced from $10,000 to $3,000 for each officer. However, on appeal to the Board, the deduction as allowed by the respondent was increased since the former found that a reasonable allowance for salaries or other compensation for these officers would be $4,000 for E. Wagner and $10,000 for Otto H. Wagner (R. 14).

It is now our position that the Board's finding is not only fair to the petitioner but also that it is based on substantial evidence and is in accord with well established principles of law.

The Revenue Act of 1928, which is applicable here, allows deductions only for ordinary and necessary expenses incurred in business, and, in including salaries or other compensation as deductible expenses, the statute has not only restricted deductions for compensation to that paid for personal services actually rendered but has also limited them to a reasonable allowance. (Section 23 (a), Appendix, *infra,* p. 28.) The Treasury Regulations issued pursuant to this statutory provision provide that the test of whether salary is deductible is whether it is reasonable and is in fact a payment for services actually rendered. As to bonuses, the regulations state that the test is whether the bonus has been paid in good faith as additional compensation for personal services and if, when added to the salaries

136550—37——2

regularly paid, the whole sum is not excessive in amount (Articles 126 and 128 of Regulations 74, Appendix, *infra,* p. 29).

In contending that a deduction should be allowed for salaries and bonuses paid, the taxpayer has the burden of proof. *Botany Mills* v. *United States,* 278 U. S. 282; *Twin City Tile & M. Co.* v. *Commissioner,* 32 F. (2d) 229 (C. C. A. 8th); *Weed & Bro.* v. *United States,* 38 F. (2d) 935 (C. Cls.), certiorari denied, 282 U. S. 846; *A. David Co.* v. *Grissom,* 64 F. (2d) 279 (C. C. A. 4th).

While as a matter of general law, directors of a corporation may decide if services have been rendered, and may make contracts paying a large salary for such services, the Federal government is not bound by any resolution of a board of directors. Moreover, salary payments as shown by a corporation's books are not conclusive as against the Government. *Becker Bros.* v. *United States,* 7 F. (2d) 3 (C. C. A. 2d); *H. L. Trimyer & Co.* v. *Noel,* 28 F. (2d) 781 (E. D. Va.).

The question of whether a salary or bonus is a reasonable allowance and so deductible is a question of fact. *Sunset Scavenger Co.* v. *Commissioner,* 84 F. (2d) 453 (C. C. A. 9th); *General Water Heater Corp.* v. *Commissioner,* 42 F. (2d) 419 (C. C. A. 9th); *Austin* v. *United States,* 28 F. (2d) 677 (C. C. A. 5th); *United States* v. *Philadelphia Knitting Mills Co.,* 273 Fed. 657 (C. C. A. 3d); *Becker Bros.* v. *United States, supra.* In deciding this question, the Board of Tax Appeals must necessarily exercise

its own judgment, and will not be required to ascertain a reasonable allowance with mathematical precision. *Tumwater Lumber Mills Co.* v. *Commissioner,* 65 F. (2d) 675 (C. C. A. 9th); *Atlas Plaster & Fuel Co.* v. *Commissioner,* 55 F. (2d) 802 (C. C. A. 8th).

Since profits may be distributed as salary or as a bonus, it is proper to consider if the payments are in proportion to the stockholdings or if in other ways they appear to be distributions of profits. *Twin City Tile & M. Co.* v. *Commissioner, supra; Marble & Shattuck Chair Co.* v. *Commissioner,* 39 F. (2d) 393 (C. C. A. 6th). Also, if there have been large increases in salary, the Board is justified in requiring what it considers to be a satisfactory explanation of the increase. *Tumwater Lumber Mills Co.* v. *Commissioner, supra.* As to opinion evidence that a salary is reasonable, this is not binding on the Board if the latter does not see fit to accept it. *Am-Plus Storage B. Co.* v. *Commissioner,* 35 F. (2d) 167 (C. C. A. 7th). Also, it is well established that the Board's findings may not be reversed on appeal because of a difference of opinion as to the weight of that evidence, and that its decision should be sustained if there is any substantial evidence to support it. *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9th); *General Water Heater Corp.* v. *Commissioner, supra.*

Applying these principles to the instant case, we submit that it is evident that the Board's decision in the instant case is based on substantial evi-

dence. The petitioner had the burden of proof but called only three witnesses by which to prove its case. Two of these were the Wagners who are the petitioner's sole stockholders and whoe salaries are here in question. The third was Mr. Carne, a part time bookkeeper, who has made up the petitioner's income tax return since its incorporation in 1924. In preparing the tentative return for 1929 which was signed by Otto H. Wagner, Mr. Carne gave the salaries of the Wagners as aggregating $6,000. As to this he testified that later when he was told that that figure should be increased to $26,000 he "was a little surprised" (R. 37).

As to the salaries which the petitioner had allowed its officers in prior years, Mr. Carne testified that in 1924 each officer was given $2,000. That was also the salary of each in 1925. In 1926, their salaries were increased to $4,000 but in 1927 they dropped back to $2,000 and that was also the amount allowed in 1928. Then he was told in 1930 when he was preparing the petitioner's return that salaries and bonuses for 1929 should be given as $13,000 for each officer (R. 35–37).

Mr. Carne expressed no opinion as to the propriety of such increases. Accordingly, the only opinions given are those of the two men to whom the salaries were to be paid. They each stated, in substance ,that $13,000 was a reasonable allowance for their services in 1929 (R. 49–50, 59), but

as it was to their obvious advantage to make such statements, the Board was undoubtedly justified in not giving their opinions the weight they might have deserved had they come from disinterested persons. Especially is this true in the absence of any showing as to what other officers in companies of similar size and kind were paid and in view of other evidence in the case which does not support the petitioner's contention that the deduction as claimed is reasonable.

From the figures given above as to salaries, it will be seen that the compensation claimed for each in 1929 is not only more than six times the salary of each officer for 1928, but it is also $1,000 more than the total amount which either had been allowed during the five preceding years. Thus the amount allowed for 1929 clearly appears to be excessive when compared with these prior years. The petitioner contends otherwise by claiming that the salaries for the earlier years were inadequate and that conditions had so changed by 1929, the large increase was justified. But we do not agree.

As to the prior years, the petitioner has failed to show what compensation was being paid for similar work in other companies during those years, or to produce any other evidence which would indicate what reasonable salaries would have been. Thus we have no adequate test by which to judge the salaries of the Wagners for earlier years. But even assuming as the petitioner contends, that

the company was financially unable to pay larger salaries in those years and that its business increased in 1929, still we maintain that the petitioner was not justified in paying as large an amount as the Wagners agreed upon.

Although the petitioners did have what its officers called a big year in 1929, yet it was still a comparatively small company in that year and its operations were not extensive. When the petitioner was organized in 1924, its equipment and plant were only worth between $15,000 and $20,000. Moreover, the box manufacturing business was a new field to the Wagners, and as they lacked experience and capital, the operations of the company were necessarily small at first (R. 42). The Wagners testified that the plant had been enlarged and new equipment had been installed (R. 56, 61), but judging from the amount of money which they indicated that they were able to borrow or to advance themselves, the value of such improvements could not have been great. Thus, even with its enlarged plant, it is evident that petitioner could not be considered a large company in 1929.

It is true that petitioner's gross sales had increased steadily since its organization in 1924 but the increase for 1929 was only about 45 per cent over 1928 (R. 36, 83), whereas the increase in compensation for each officer in 1929 was 550 per cent more than had been paid each one in 1928. Moreover, even though the Wagners stated that they

considered 1929 a successful year, they also admitted that they continued to have difficulties in securing enough money to run the business. Their testimony shows that such difficulties were experienced not only in getting money for capital investments but also in borrowing enough money to meet the current expenses of 1929 for the petitioner's financial status was such that it could not get more than $15,000 from outside sources during 1929 (R. 44, 53, 60–61). Thus we see that the petitioner was not in a position to pay such large salaries even in 1929. Moreover, it appears that the Wagners knew this for even though they agreed to allow themselves $13,000 each for 1929, actually they took only part of that amount in cash, and so acted just as in former years when they had not withdrawn all of the amounts credited to them on the petitioner's books. Such action on the part of the Wagners is, we submit, a strong indication that the amounts agreed upon for 1929 were larger than the petitioner could afford to pay.

There is a further factor to be considered here in connection with the petitioner's business for 1929 and that is the nature of the duties rendered by the officers in that year. Considering first the services of Otto Wagner, we find that he was actively in charge of all of the petitioner's sawmill and manufacturing operations and handled most of the sales. However, from his own description of his work, it does not appear that it changed mate-

rially in that year except for longer hours (R. 44). The increased hours were due to the fact that beginning June 1, 1929, and going through to October or November, the petitioner ran a double shift at its plant (R. 43–44, 51). However, on one shift, the petitioner had a superintendent who was in charge and of course could relieve Wagner of some of the work (R. 55). Moreover, these long hours did not last throughout the year for the business of petitioner is seasonal, being carried on for not more than eight months of a year, and begins in April (R. 52). Thus the salary allowed Otto Wagner for 1929 was really for work which was full time for only eight months and which was on a double shift for only part of that time. Consequently, even though we assume that Otto Wagner's duties were heavier in 1929, we believe that, in view of the foregoing facts, the Board was justified in determining that reasonable compensation for Otto Wagner was $10,000. Certainly, as this was 400 per cent more than he received in 1928, such allowance is a generous one.

While the petitioner bases a part of its argument on the salary received by its superintendent (Br. 11), we do not see how this should effect the finding made by the Board. The testimony shows that the superintendent received about $7,000 in salary during 1929 (R. 55). Otto Wagner stated that such amount consisted of $3,600 paid as salary, $600 as a bonus, and a contract for an interest in

the mill property on which the superintendent was allowed a credit of about $3,000 (R. 54). There is no other testimony as to the superintendent's salary and so we do not know how the value of the contract was determined. Moreover, in testifying as to this, Otto Wagner did not seem very sure as to the exact amount of the bonus or of the total sum but assuming that the figures he gave are correct, we submit that even judged by the superintendent's salary, the Board's allowance to Otto Wagner is still a fair and reasonable amount.

As to the compensation allowed to the father, E. Wagner, who was 74 years old in 1929, we think the Board's allowance of $4,000 was also a fair one under the circumstances of this case. He testified (R. 57–58, 60) that his health began to break down in July 1929, that he had to quit work entirely a little later on, and that he left the country for an ocean voyage on October 1st and did not return until June 1930. His duties during the seven months of 1929 which he worked related largely to the subdividing of a tract of land which was formerly an orchard, to selling of lots therefrom, and to building small, inexpensive cabins and houses when the lots could not be sold otherwise. He also made trips once or twice a week to the petitioner's manufacturing plant, and sometimes went on scouting trips for timber. While the son testified (R. 55) that he and his father put in more time than their superintendent in 1929, we must

assume that the father knew more about his hours of work than his son and the former stated that the superintendent put in more time in 1929 than he did (R. 58). Also the father did not indicate that his duties were any heavier than they were in prior years and we cannot, of course, assume that they were. On the other hand, we may assume, in the absence of a contrary showing, that in such years he gave his full time, whereas in 1929 we know that he put in only seven months and part of that time he was partially incapacitated by illness (R. 60). The petitioner has stated (Br. 10) that Mr. E. Wagner could have earned more than $13,000 in other lines of work but that assertion is based merely on Wagner's statement (R. 59) and was given without any facts as to offers which he had received or actual possibilities. But even if it is true, that does not mean that the compensation due him for seven months' work from petitioner should have exceeded the $4,000 which the Board allowed. That amount is an increase of 100 per cent over the preceding year and is a reasonable allowance for the services rendered.

In considering the reasonableness of the Board's allowance for compensation, it should also be noted that E. Wagner and Otto Wagner were the sole stockholders of the petitioner, that they owned an equal amount of stock, and that the petitioner declared no dividends in 1929 although it found that it was possible to allow each of its officers

an increase in compensation of 550 percent (R. 13, 52). As the petitioner had never declared any dividends, it is, of course, evident that the only way any of its profits had ever reached its two stockholders was by way of salaries and bonuses. As the amounts credited to each one in 1929 were equal, the salaries were allowed in the same proportion as dividends would have been paid, if declared, and so we submit were in part a distribution of profits. We find further support for this conclusion in the testimony of Otto Wagner, indicating that the increase in compensation was determined by the profits which they expected to make. Thus he explained that when in June of 1929 he and his father realized they were going to have a big year, they decided to increase their salaries to $10,000 and later they decided also to take a bonus of $3,000 each (R. 45–46, 52).

In view of the evidence referred to above, we submit that there is ample basis for the Board's finding as to what constitutes a reasonable allowance for compensation and so its determination should be sustained.

II

The deduction now claimed by the petitioner for interest should be denied because it has not been shown that there was a valid obligation to pay interest or, if there was, what the correct amount of interest should be

On its income tax return for 1929, the petitioner took a deduction of $4,759.53 for interest accrued

on its books for that year. The respondent determined that such deduction should be limited to $2,009.53 and the Board sustained his determination (R. 17). Thus the amount disallowed by the respondent and in issue before the Board was $2,750 and that is also the amount involved on this appeal (R. 5, 14, 16, 31 [2]).

The burden of proof was also on the petitioner on this point and to sustain its burden it should have shown that this item of interest had either been "paid or accrued within the taxable year" (Section 23 (b), Appendix, *infra,* p. 28). As it was never claimed that any of this interest was paid, it was of course necessary for the petitioner to show that the interest was accrued within the statutory meaning. Obviously, this requires more than production of a mere book entry for it is fundamental that no interest may be accrued unless it has become vested, and it will not be vested unless there is a legal obligation to pay interest since interest is not a mere gratuity. Moreover, even when there is a valid obligation, no sum should be accrued as interest unless the evidence shows that it is the correct amount due. This means that evidence should

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[2] Assignments of error (5) and (14) refer to the amount of interest disallowed as $2,906.22 and assignments (6) and (15) to the amount as $1,743.73 (R. 32–33). These assignments are misleading as they indicate that the Board made findings relative to such amounts. Instead, its findings on the interest question referred only to the item of $2,750, which was the amount referred to in the petition before the Board (R. 5).

be produced to show what the correct amount is and such evidence should include the amount of the loan on which the interest is due, the rate of interest, and the length of time within the year which the loan covers. The petitioner did produce some documentary evidence but the figures therein are partially contradicted by statements of the Wagners and its evidence is not complete. Thus it has failed to meet its burden and is not entitled to any deduction for interest in addition to that allowed by the Board.

Taking up first the matter of whether there was any obligation on the part of the petitioner here to pay this interest, it is our position that it was not so obligated. The item of $2,750 was an entry on petitioner's balance sheet dated December 31, 1929, and it appears over an explanation that this is "interest accrued on loans from officers" (R. 98). But this entry was not made until April 1930, when Carne closed the petitioner's books. The amount of $2,750 was given to Carne at that time by Otto Wagner, who said that it represented interest at the rate of 10 percent (R. 14, 41, 49). It is of course well established that bookkeeping entries are not conclusive and that they must yield to the real facts. *Gulf Oil Corp.* v. *Lewellyn,* 248 U. S. 71; *Landers Bros. Co.* v. *Commissioner,* 60 F. (2d) 85 (C. C. A. 6th). Certainly this entry should not be conclusive for it was not made until more than three months after the end of the tax year. At that time the petitioner's income tax was also being

computed so the question of deductions was undoubtedly then uppermost in the minds of the interested parties. Thus the matter of interest was an afterthought and was adopted after the expiration of the year in an apparent attempt to decrease taxes. Being an afterthought, and not pursuant to an agreement, it is evident there was no obligation to pay interest. This is shown by the evidence.

Otto Wagner testified that the petitioner had no agreement to pay this item of interest (R. 54). Moreover, he admitted that the matter of allowing such interest was not decided until his trip to Seattle in April 1930, to see Carne, who was closing the petitioner's books and making up its income tax return (R. 37, 49), and Carne testified that there were no entries in the petitioner's books relative to an agreement to pay interest (R. 41). Based on this evidence, the Board found that there was no agreement on the part of petitioner here to pay interest to its officers (R. 14). Consequently, we conclude that since the petitioner had not agreed to pay, it had no obligation to pay interest and any allowance it might make would be merely a gratuity and not deductible.

Interest is the amount one contracts to pay for use of borrowed money. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552. Interest cannot be charged unless it is the subject of an express agreement or is specifically allowed by statute or by some well established business custom. *Young* v. *Canfield,* 33 Cal. App. 343; *Totten* v. *Totten,* 294 Ill.

70; *Clark* v. *Giacomi,* 85 Colo. 530, 536; *Sargent* v. *American Bank and Trust Co.,* 8 Ore. 16, 46. In the instant case, neither the state law [3] nor any custom specifically allows such interest and since there was no agreement, none may be allowed.

A similar question was presented in *Miller Safe Co.* v. *Commissioner,* 12 B. T. A. 1388, in which, as here, a stockholder advanced money to his corporation without any agreement as to interest. It was held there that the corporation was not obligated to pay interest and should not be allowed to deduct for it in its tax return, even though it paid the stockholder for the use of the money, since such allowance on the corporation's part was a gratuity.

In another case, a partner left his share of the partnership's profits in the business without any agreement as to interest thereon. Later when the partner sued and an accounting was ordered, it was held that he could not recover any interest on the money advanced. See *Dugan* v. *Forster,* 104 Cal. App. 117.

We submit that these cases state the correct rule and that the petitioner must fail because of the lack of an agreement. It seems strange that the

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[3] Petitioner claims that Section 7299, Vol. II, of Remington's Compiled Statutes of Washington requires the payment of interest here, but it appears that that section applies to loans which are made pursuant to express contracts but in which no rate of interest is named, whereas here there was no agreement of any kind. For the subject matter of Section 7299, see petitioner's brief, p. 20, or Record, p. 24.

petitioner should now be contending that interest was due the Wagners. The latter knew the petitioner's financial difficulties and undoubtedly never intended to charge interest when their money was left with petitioner. Such sums were always subject to withdrawal at the pleasure of either officer and throughout 1929 withdrawals were made frequently as will be seen from an examination of the accounts of the Wagners with the petitioner (R. 101–102) and also from their testimony (R. 53, 60). Obviously, there was nothing definite or settled about the amounts or the length of time which these sums would remain with petitioner, and they were not meant to be interest bearing loans.

In disallowing the deduction, the Board found that there was no evidence to indicate that any part of the salaries or bonuses was payable prior to the end of 1929 and that, in the absence of such proof, there was nothing to show that the petitioner was entitled to any larger deduction for interest than that allowed by the Commissioner (R. 17). We submit that the Board's finding as to the evidence is correct. The Wagners testified as to the yearly sums they voted themselves but did not state how they were to be paid. Obviously it is true that if the salaries and bonuses were not due before the end of the year, and there is no evidence otherwise, then the petitioner did not use any part of such sums in 1929, after they were payable to the Wagners. Thus no interest would be due on account of 1929 salaries and bonuses.

However, assuming for the sake of argument that the petitioner could take a deduction for interest without an agreement to pay it, and that the salaries and bonuses were payable before the end of the year, the deduction here should still be denied because the petitioner has failed to show what the correct amount of interest would be. The petitioner now admits (Br. 17–18) that $2,750 is not the correct amount and asserts that such amount is either $2,906.02 or $1,743.73, depending on whether interest is allowed at ten per cent or six per cent. The petitioner is of course in error in urging interest at ten per cent, for in cases like this one where the rate is not set out in a written agreement, the law of Washington prohibits interest higher than the legal rate, which is six per cent. *Hart* v. *Steele,* 168 Wash. 336; *Connecticut Investment Co.* v. *Yokon,* 106 Wash. 693; *Sandberg* v. *Scougale,* 75 Wash. 313.

Thus we can eliminate both $2,902.02 and $2,750 since these amounts are supposed to represent interest at ten per cent. We must also eliminate the sum of $1,743.73, for it is obvious when the testimony of the Wagners is compared with the bookkeeper's computation of interest that sum is not a correct amount. This item of $1,743.73 represents $515.04 claimed as interest on 1929 salaries and bonuses and $1,228.69 claimed as interest on advances made by the Wagners in 1929 and prior years (R. 101–102).

Taking up the $515.04 item first, it appears from the bookkeeper's interest exhibits (R. 101–102) that both of the Wagners left all of their salaries and bonuses with the petitioner throughout 1929. Thus interest was figured on the full $26,000 up until December 31 of that year. However, E. Wagner testified that he drew $5,000 of his 1929 salary to get a steamship ticket in September 1929 (R. 60–61). Also Otto Wagner stated that in 1929 he and his father withdrew such money as they needed for living purposes and that his own withdrawals were about $2,500 (R. 53). Otto Wagner did not state that the latter withdrawals were from the 1929 salaries. Neither did he say that they were not. Thus it is as reasonable to assume that they were as that they were not, and as the petitioner has the burden of proof, he should have shown the source and amount of the sums on which it is claiming interest.

At any rate it is true that part of the withdrawals were from the 1929 salary fund, and it was wrong for the bookkeeper, in estimating the amount on which interest was due, to include the entire sum allowed for salaries and bonuses. Moreover, as the record does not show the date on which such sums were payable, the actual amount of money withdrawn by the Wagners, or the exact time of the withdrawals, the extent of the bookkeeper's errors cannot be determined at this time. So having failed to produce the evidence necessary to estab-

lish its claim for $515.04 in interest or any other amount, the petitioner must now be denied the right to deduct anything for interest on salaries and bonuses for 1929.

There is also uncertainty and insufficient proof in regard to the other interest item of $1,228.69 which consists of $147.37 claimed as due E. Wagner and $1,081.32 as due Otto Wagner on salary left by them from prior years and also for some outright advances made by them (R. 38, 101–102). From the balances listed as due the Wagners throughout 1929, it appears that only a small part of such advances were made by the Wagners to the petitioners during 1929. (See first 12 items on the exhibits, R. 101–102.) This should be noted specially because the petitioner has definitely indicated in its petition for review in this Court that the interest now in question does not relate to advances or salary left from other years and explains that the respondent allowed interest on those amounts (R. 31). Accordingly, it seems apparent that we should at once eliminate from the above items such portion as represents interest on advances made in the prior years. From an examination of the interest exhibits (R. 101–102), it will be seen that this would take up most of the $1,228.69 and so that figure should be greatly reduced, but in the absence of evidence as to the exact date when the advances were made, the correct amount cannot be computed.

There is no reason why we should not adopt the statement in the petition for review that interest for prior years was allowed as a deduction. The record shows that the Commissioner allowed a deduction for interest in the amount of $2,009.53 (R. 16). We also know that such amount exceeds the amount of interest due on outside loans to petitioner during 1929 for such loans did not exceed $15,000, and the interest, being paid partly at eight per cent and partly at ten per cent, could not have exceeded $1,500 (R. 44, 49, 60). So it follows that the difference between the interest paid outsiders and the amount allowed by the Commissioner must represent interest due to the petitioner's officers on the advances made in prior years. Thus the petitioner has already received what we believe to be a generous allowance on its interest claim, and one which, if it had been litigated, would doubtless have been refused because of the absence of any valid obligation to pay. Certainly, even if the petitioner is entitled to deduct interest, it should not be allowed any additional deduction now in view of its failure to produce evidence from which a correct computation of interest can be made.

Therefore, the Board, properly refused to allow either of the deductions claimed by petitioner, and it is immaterial that the Board's reasons for disallowing the interest item are not in all respects the same as those advanced by the respondent as it reached the correct decision. *Dickey* v. *Burnet,*

56 F. (2d) 917 (C. C. A. 8th), certiorari denied, 287 U. S. 606.

The petitioner has given a recomputation of the tax in its brief (p. 21) as it contends it should be if the Board's decision is reversed. We do not consider that this is a matter to be discussed here but do call attention to the fact that the petitioner is in error in figuring the tax at 11 per cent since the rate given in the 1928 Act is 12 per cent. (Section 13 (a), *infra,* p. 28.)

CONCLUSION

The Board's decision should be affirmed.

Respectfully submitted.

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Special Assistants to the Attorney General.

APRIL 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 13. TAX ON CORPORATIONS.

(a) *Rate of tax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax of 12 per centum of the amount of the net income in excess of the credits against net income provided in section 26.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1927, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.

SEC. 26. CREDITS OF CORPORATION AGAINST NET INCOME.

For the purpose only of the tax imposed by section 13 there shall be allowed the following credits:

* * * * *

(b) In the case of a domestic corporation the net income of which is $25,000 or less, a specific credit of $3,000; but if the net income is more than $25,000 the tax imposed by section 13 shall not exceed the tax which would be payabe if the $3,000 credit were allowed, plus the amount of the net income in excess of $25,000.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 126. *Compensation for personal services.*—Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the

excessive payments correspond or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. * * *

* * * * *

(3) In any event the allowance for the compensation paid may not exceed what is reasonable in all the circumstances. It is in general just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises in like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.

ART. 128. *Bonuses to employees.*—Bonuses to employees will constitute allowable deductions from gross income when such payments are made in good faith and as additional compensation for the services actually rendered by the employees, provided such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered. It is immaterial whether such bonuses are paid in cash or in kind or partly in cash and partly in kind. Donations made to employees and other, which do not have in them the element of compensation or are in excess of reasonable compensation for services, are not deductible from gross income.

U. S. GOVERNMENT PRINTING OFFICE: 1937

No. 8415

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

E. WAGNER & SON, INC., a corporation,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF OF PETITIONER

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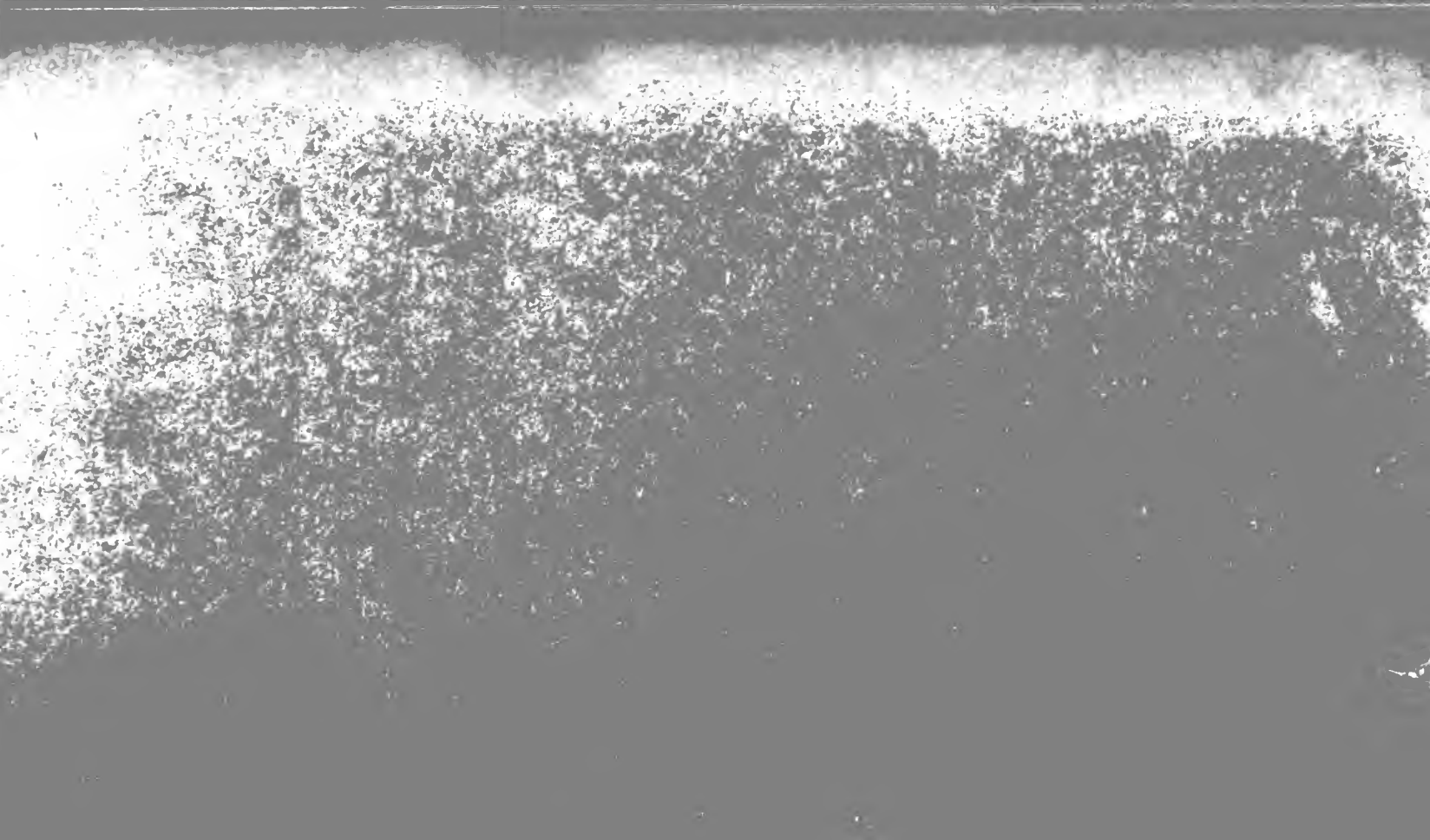

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SUBJECT INDEX

Page

TABLE OF STATUTES AND CASES

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ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF OF PETITIONER

JURISDICTION

The controversy involves the proper determination of petitioner's liability for Federal income tax for the calendar year 1929. The petitioner, E. Wagner & Son, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Washington. The income tax return of the said corporation for the taxable year 1929 was duly filed within the time provided therefor, with the Collector of Internal Revenue for the District of Washington, within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit (R. 83). On March 12, 1932, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in in-

come taxes for the calendar year 1929 in the amount of $2,670.61 (R. 35, 63).

A petition for redetermination of the deficiency and for a refund of overpayment was filed with the United States Board of Tax Appeals May 7, 1932, in Cause No. 65845 (R. 1, 4), pursuant to the provisions of the Revenue Act of 1926, Sections 1000, 308 and 274, as amended by Section 272, Revenue Acts of 1928 and 1932. The Board redetermined the deficiency in the amount of $1,333.44 (R. 28).

This appeal is taken from the decision of the United States Board of Tax Appeals promulgated July 6, 1936 (R. 3, 28), and is brought to this court by Petition for Review (R. 29) filed October 5, 1936 (R. 3, 34), pursuant to provisions of the Revenue Act of 1926, Sections 1001-1003, c. 277, 44 Stat. 109-110, as amended by the Revenue Act of 1932, Section 1101, c. 209, 47 Stat. 169, as amended by the Revenue Act of 1934, Section 519, 48 Stat. 760.

STATEMENT OF THE CASE

This case involves the proper determination of petitioner's liability for Federal income tax for the calendar year 1929.

Mr. E. Wagner was president of the petitioner corporation at all times material to these proceedings (R. 42), and Otto H. Wagner was secretary, treasurer and general manager (R. 41). They were also the trustees (R. 45) and devoted their entire time to the management of its business. These trustees held two meetings during 1929 for the purpose of considering officers' salaries. They decided in June, 1929, that they should receive a salary of $10,000 each for 1929 and subsequent years (R. 46, 58). At the meeting held in September, 1929, it was decided that they should each receive a bonus of $3,000 for services performed during 1929 (R. 58). The total sum of $13,000 for Mr. E. Wagner and a like sum for Otto H. Wagner were reasonable values for personal services rendered by these men during the year 1929. The petitioner claimed a deduction in its income tax return for the calendar year 1929 on account of compensation paid its officers in the amount of $26,000 (R. 83). The Commissioner of Internal Revenue disallowed $20,000 of this amount (R. 66). Upon petition for redetermination the Board allowed $10,000 for Otto H. Wagner and $4,000 for Mr. E. Wagner (R. 14).

Mr. E. Wagner and Otto H. Wagner made loans to the petitioner prior to and during 1929, and in addition thereto, they left undrawn with the petitioner

part of their salaries and bonuses for the years 1929 and prior thereto (R. 53). Interest on these amounts was deducted by the petitioner in its income tax return for the calendar year 1929 (R. 83). The Commissioner of Internal Revenue allowed interest in the amount of $2,009.53 during this year on loans made by the corporation from sources other than its officers (R. 39, 40, 41, 65, 83). The Commissioner had allowed interest on loans and undrawn salaries of these officers of the petitioner for years prior to 1929. However, the Commissioner of Internal Revenue disallowed any interest during 1929 on loans, salaries and bonuses left with petitioner during 1929 and prior years by Mr. E. Wagner and Otto H. Wagner. The amount so claimed and disallowed was $2,750, which was corrected in proof before the Board to $1,743.73 (at 6% interest, or $2,906.22 in case 10% interest be allowed) (R. 39, 40, 41, 66, 98). The Board sustained the Commissioner in this disallowance. The Board member who conducted the hearing filed a strong dissenting opinion. One other member also dissented (R. 17 to 28).

The petitioner should be allowed deductions of:

1. $13,000 salary for Otto H. Wagner, which is $3,000 more than the Board allowed.

2. $13,000 salary for Mr. E. Wagner, which is $9,000 more than the Board allowed.

3. $1,743.73 (at 6% interest, or $2,906.22 in case 10% interest be allowed) interest on loans, salary and bonuses left with petitioner by these officers. This was disallowed by the Board.

These deductions will result in a refund to the petitioner in the amount of $178.37 (with the 6% interest item, or $306.24 at 10%), rather than a deficiency of $1,333.44 as determined by the Board.

NUMERICAL SPECIFICATION OF ERRORS RELIED UPON

The numerical specification of the assigned errors to be relied upon are as follows: (1) (R. 32), (2) (R. 32), (3) (R. 32), (4) (R. 32), (5) (R. 32), (6) (R. 32), (7) (R. 32), (8) (R. 32), (9) (R. 33), (10) (R. 33), (11) (R. 33), (12) (R. 33), (13) (R. 33), (14) (R. 33), (15) (R. 33), (16) (R. 34).

ARGUMENT

A. Salaries Claimed Are Reasonable and Deductible

Assignments of Error:

(1) The finding that a reasonable allowance as compensation for services rendered by E. Wagner for the year 1929 was less than $13,000, is unsupported by any evidence (R. 32).

(2) The finding that a reasonable allowance as compensation for services rendered by Otto H. Wagner for the year 1929 was less than $13,000 is unsupported by any evidence (R. 32).

(3) The finding that petitioner is not entitled to the deduction from petitioner's gross income for the year 1929, of the sum of $13,000 for compensation for personal services rendered by E. Wagner, is unsupported by any evidence (R. 32).

(4) The finding that petitioner is not entitled to the deduction from petitioner's gross income for the year 1929 of the sum of $13,000 for compensation for personal services rendered by Otto H. Wagner, is unsupported by any evidence (R. 32).

(7) The findings of fact are not supported by the evidence (R. 32).

(8) The findings of fact are contrary to the evidence (R. 32).

(10) The failure to allow as a deduction from the petitioner's gross income for the year 1929 the sum of $13,000 for compensation for personal services rendered by E. Wagner (R. 33).

(11) The failure to allow as a deduction from the petitioner's gross income for the year 1929 the sum of $13,000 for compensation for personal services rendered by Otto H. Wagner (R. 33).

(12) The failure to determine that the sum of $13,000 was a reasonable allowance for compensation for personal services of E. Wagner for the year 1929 (R. 33).

(13) The failure to determine that the sum of $13,000 was a reasonable allowance for compensation for personal services of Otto H. Wagner for the year 1929 (R. 33).

1. Duties of Otto H. Wagner

Otto H. Wagner is the son of Mr. E. Wagner. He was secretary, treasurer and general manager and one of the trustees of the corporation (R. 41, 43).

His duties included cruising timber owned by the State of Washington, making application for its purchase, laying out logging work, cutting timber and bringing the timber into the saw mill (R. 50). He supervised the saw mill and box factory and lumber yard operations at Okanogan. He handled the sales end of the business in Okanogan County (R. 50).

2. Duties of Mr. E. Wagner

Mr. E. Wagner was the real "brains" of the organization. He was a man of long and successful business experience. He was able to earn and did earn from $40,000 to $100,000 in a few months' time from 1906 to 1918 (R. 59). He first went into the saw mill business in 1888. He founded the petitioner corporation in 1924 and became president (R. 56). He turned over to the corporation all the property he owned. In 1924 the saw mill consisted of a small circular saw mill and a home made box factory. The saw mill was improved every season (R. 56). The principal office of the corporation was at Wenatchee (R. 41) where he resided (R. 56). He had charge of converting the corporation's unprofitable orchard tracts into residential tracts (R. 53). He worked night and day, drawing plans, subdividing tracts, making contracts, financing homes, supervising construction, advertising for sale, showing the properties to prospects, and marketing the property (R. 43, 58). He supervised the work of 20 or 30 men. He also handled the selling of lumber and box shooks made at the mill and box factory, in the vicinity of Wenatchee (R. 53). In addition to this, he consulted with his son about formulation and supervision of

policies concerning the operations at Okanogan (R. 43). He would go once or twice a week for this purpose (R. 57). He would help scout the timber, see where they would buy and supervise the cutting (R. 57). He did work in connection with the mill property, the saw mill itself (R. 57). He struggled with the financial arrangements for the real estate and also the saw mill operations (R. 43). At no time was the company able to borrow any money without his individual indorsement (R. 44, 58).

3. 1929 Operations

The business of the petitioner corporation consisted in subdivision development, home construction, logging, lumbering and box making.

The subdivision work at Wenatchee in 1929 included laying out acre tracts, half acre tracts, quarter acre tracts and fifty foot lots, drawing plans, specifications and contracts for building, financing individual houses and supervising purchase of material and construction and painting of houses and cabins (R. 43, 53, 54, 57).

The sales end in the vicinity of Wenatchee of the box shooks and lumber business was conducted in that fruit growing center (R. 53).

The manufacturing and saw mill operations were conducted near Okanogan (R. 53). Scouting timber, buying and cutting depended upon the location (R. 57). The lumber cutting and box making business of the corporation was seasonal, less than eight months out of the year (R. 52).

The salary of $10,000 and $3,000 bonus was reasonable for Mr. E. Wagner and Otto H. Wagner for

the year 1929 (R. 46, 49). The work was worth it (R. 59).

The year 1929 was their first big year compared with prior years (R. 45). The subdividing operations near Wenatchee in 1929 constituted an unusual undertaking for the year (R. 43). Much new equipment was installed prior to the 1929 season (R. 61, 62). A double shift was put on at the factory the first week in June. These shifts were ten hour shifts and during the four hours between shifts they would repair machinery (R. 56).

The gross sales of the company jumped from approximately $20,000 in 1924 to over $220,000 in 1929, more than ten times (R. 36). The profits were substantial (R. 83).

The number of officers and employees in the administrative and executive ends of the business of other mill operations by competitors in the vicinity, was more than double those kept by petitioner (R. 50, 59). This economy saved the petitioner the expense of paying high salaries to experts.

Standard Silk Dyeing Co., 9 B. T. A. 648, 650.

In *Fox River Iron Co.*, 5 B. T. A. 810, 813, the Board stated:

> "When inquiring as to the reasonable compensation for services of a corporation's officers we may properly consider the duties performed, the responsibilities assumed, and the volume of business handled, and a comparison of these facts in respect of the corporation under inquiry

with like facts respecting other taxpayers similarly circumstanced."

Mr. E. Wagner could have earned more than $13,000 in other lines of work (R. 59). He could have gone out in 1929 and made $40,000 or $50,000 (R. 59). This compensation for 1929 was really underpay (R. 59).

The results accomplished by the officers and their responsibilities justified the compensation allowed.

In *Union Dry Goods Co.*, 1 B. T. A. 833, 837, the Board stated:

> "We think that, measured by the results accomplished, both from the standpoint of volume of business transacted and profits to the corporation arising therefrom, the salaries paid to its officers were not unreasonable or excessive for the services rendered."

And in *Stilwell Paper Co.*, 6 B. T. A. 531, 535:

> "Considering the services rendered, the experience of the officers and other facts, we think that the amounts were reasonable."

4. Prior salaries inadequate

The salaries taken by the Wagners for the years prior to 1929 were inadequate. They were just nominal. They did not compensate them for the work actually performed (R. 51). They drew small salaries of two to four thousand dollars (R. 35) from force of necessity to protect the corporation financially (R. 52, 56 and 60). It was practically impossible during those years for the corporation to borrow money. The officers felt that if they drew salaries such as their work justified, the company would be financially

embarrassed and the operations thus hindered (R. 44, 49, 58).

Several years may be considered in arriving at a true picture of what was actually accomplished by the officers. In *Claude A. Prager*, 10 B. T. A. 22, 25, the Board stated:

> "The authorization and payment of compensation in a given year, as and for compensation in that year, may be measured by services performed in a prior year and in the light of circumstances surrounding the payment of compensation already paid in those years. It is also true that the payment of additional salaries in one year may have in them an element looking to future services."

5. Salary of mill superintendent $7,200.00

The time which the superintendent put in would be about one-half of the time put in by either Mr. E. Wagner or Otto H. Wagner (R. 55). The superintendent only worked one shift. His responsibility was limited to taking charge of the actual saw mill operation and seeing that the box factory made proper boxes. He was primarily a box maker. He received $3,600 salary, $600 cash bonus, and $3,000 property bonus, totaling $7,200 (R. 54, 55). The duties, ability, experience, and responsibilities of Mr. E. Wagner and Otto H. Wagner far exceeded those of the superintendent. They should be allowed pay accordingly.

6. Presumption of reasonableness

Salaries voted by corporate directors (R. 46, 58) are presumed reasonable and proper.

A contrary view was assumed by the U. S. Board of Tax Appeals in *Ox Fibre Brush Co.* (8 B. T. A. 422, 426):

> "In support of its contention that such amount was reasonable compensation for 1920, the petitioner takes the position that the action of the board of directors of a corporation in authorizing salaries for a given year raises a presumption that the amount voted is reasonable and complies with the statute until the contrary be proven. In other words, the petitioner insists that the burden of proof is on the respondent to show that the salaries for 1920 were unreasonable. We are unable to agree with the petitioner in this respect."

This case was reversed by the Circuit Court in *Ox Fibre Brush Co. v. Blair*, 32 F. (2d) 42, 45, 7 A. F. T. R. 8673 (affirmed 50 S. Ct. 273, 74 L. Ed. 733, 8 A. F. T. R. 10901), stating:

> "Turning to the Board of Tax Appeals' second conclusion, we are likewise forced to declare that to be erroneous. The action of the board of directors of a corporation in voting salaries for any given period is entitled to the presumption that such salaries are reasonable and proper . . . The prima facie presumption in favor of the action which a corporation has taken in cases of this kind has repeatedly been recognized by the Board of Tax Appeals itself. For example, see *Collins-McCarthy Candy Co. v. Commissioner*, 4 B. T. A. 1280; *Standard Silk Dyeing Co. v. Commissioner*, 9 B. T. A. 648. This presumption

is in no wise inconsistent with the principle that the burden of proof rests upon the taxpayer."

In *Toledo Grain & Milling Co. v. Commissioner*, 62 F. (2d) 171, 172, 11 A. F. T. R. 1073, the court reversing the Board stated:

"The resolution of the Board of Directors of April 4, 1919, creates the inference that the salary allowances were reasonable."

In *Collins-McCarthy Candy Co.*, 4 B. T. A. 1280, 1284, the Board of Tax Appeals stated:

"We are content to rest our decision on this point upon the proposition that the action of the board of directors of a corporation in authorizing salaries for a given year is entitled to the presumption of correctness unless the contrary be proven, and, such not having been done in this case, the action of the board of directors must stand."

In *Vaughan & Barnes, Inc.*, 6 B. T. A. 1279, 1285, the Board of Tax Appeals stated:

"We should be very cautious in substituting our judgment as to the reasonableness of salaries for that of the corporation itself."

In *Standard Silk Dyeing Co.*, 9 B. T. A. 648, 651, the Board said:

"We find no evidence in the record that warrants the substitution of the Commissioner's judgment for that of the petitioner's board of directors, even though it be in the matter of authorizing their own salaries."

7. Board fixed an arbitrary value for services

The respondent Commissioner determined the salaries at $3,000 each (R. 66, 83).

> "The determination of the Commissioner is prima facie correct and must stand unless overcome by substantial evidence."
>
> *Nichols v. Commissioner*, 44 F. (2d) 157, 158, 9 A. F. T. R. 285.

The Board was convinced that the determination of the Commissioner was overcome by *substantial evidence*. It raised both salaries.

> "The burden then shifted to the Commissioner to support his determination by evidence, and this he did not do nor attempt to do, and accordingly his determination cannot stand." *Nichols* case, *supra*, p. 159.

The Commissioner offered no evidence. The Board then "should not have disregarded the only positive and direct evidence" introduced as to value. *Boggs & Buhl v. Commissioner*, 34 F. (2d) 859, 861, 8 A. F. T. R. 9631. As in *Nichols v. Commissioner*, *supra*, p. 159:

> "The Board of Tax Appeals disregarded all the positive and affirmative evidence in the case. Its own findings are not predicated upon any substantial evidence, and therefore its redetermination is set aside, the determination of the Commissioner reversed, and the income tax return of the petitioner approved."

The Board could not justly fix an arbitrary or theoretical valuation. However, it attempted to do this,

and this Court is not bound by the findings of the Board.

Nachod & United States Signal Co. v. Helvering, 74 F. (2d) 164, 14 A. F. T. R. 819.

In *Foster v. Commissioner*, 57 F. (2d) 516, 518, 10 A. F. T. R. 1570, the Court stated:

> "Bound as we are to indulge in favor of findings of the Board upon fact questions, such as value, every reasonable intendment, obligated as we are not to upset them when they are sustained by the evidence (*Phillips v. Comm.*, 283 U. S. 600, 51 S. Ct. 608, 75 L. Ed. 1289), we are not bound by a value the basis of which is arbitrarily or theoretically set down. *The Board may not create;* it must find in the evidence the value which it fixes."

The value must not be mere "conjecture".

Boggs & Buhl v. Commissioner, 34 F. (2d) 859, 861, 8 A. F. T. R. 9631.

There is no evidence that the Board had any independent and personal knowledge of the business.

Pittsburgh Hotels Co. v. Commissioner, 43 F. (2d) 345, 9 A. F. T. R. 83.

However, the Board member who conducted the hearing at Seattle, the Honorable Stephen J. McMahon, did see and hear the men who ran the business, and saw the country in the general vicinity. This member, in his dissenting opinion, concurred in by the Honorable J. Russell Leech, states:

> "The record fails to disclose evidence to support a finding of fact or holding that a reason-

able allowance as compensation for services rendered by the Wagners for the year 1929 is less than $13,000 each. The witnesses for petitioner were intelligent candid and in all respects credible; their testimony was not impeached; and no countervailing evidence was offered by respondent." (R. 20)

"Decision of question of fact by Board of Tax Appeals is not binding on appeal where only the dissenting member was present when testimony was taken." Syllabus *Jewett & Co. v. Commissioner*, 61 F. (2d) 471, 11 A. F. T. R. 958.

"The function of the Court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made." *Helvering v. Rankin*, 295 U. S. 123, 55 S. Ct. 732, 15 A. F. T. R. 1076.

There is no evidence to support a finding that a sum less than $13,000 is reasonable compensation (R. 14). The majority of the Board disregarded uncontroverted and unimpeached testimony.

In *Dempster Mill Mfg. Co. v. Burnet*, 46 F. (2d) 604, 606, 9 A. F. T. R. 797, 799, the Court, reversing the Board, said:

"It was his testimony that was rejected as being the testimony of an interested witness. We think it was error to disregard the testimony of this witness, inasmuch as it stands uncontradicted."

In *Planters' Operating Co. v. Commissioner*, 55 F. (2d) 583, 585, 10 A. F. T. R. 1130, the Court, reversing the Board, stated:

> "(3) That it is reversible error for the Board of Tax Appeals to disregard competent relevant testimony when it is not contradicted."

Heywood Boot & Shoe Co. v. Commissioner, 76 F. (2d) 586, 15 A. F. T. R. 1192;

Blackmer v. Commissioner, 70 F. (2d) 255, 13 A. F. T. R. 957;

Bonwit Teller & Co. v. Commissioner, 53 F. (2d) 381, 10 A. F. T. R. 656.

B. Interest on Loans, Advances, and Undrawn Salaries Deductible

Assignments of Error:

(5) The finding that petitioner is not entitled to the deduction of $2,906.22 (corrected amount instead of $2,750.00) interest at 10% (the contract rate) paid on loans and undrawn salaries for 1929, is unsupported by any evidence (R. 32).

(6) The finding that petitioner is not entitled to a deduction of at least $1,743.73 interest at 6% (the statutory rate in the State of Washington) on loans and undrawn salaries for 1929, is unsupported by any evidence (R. 32).

(7) The findings of fact are not supported by the evidence (R. 32).

(8) The findings of fact are contrary to the evidence (R. 32).

(14) The failure to allow as a deduction from

the petitioner's gross income for the year 1929 the sum of $2,906.22 (corrected amount instead of $2,750.00) interest at 10% (the contract rate) paid on loans to the petitioner by its officers and on unpaid balances left with the company during the year (R. 33).

(15) The failure to allow as a deduction from the petitioner's gross income for the year 1929 at least the sum of $1,743.73 interest at 6% (the statutory rate in the State of Washington) on loans to the petitioner by its officers and on unpaid balances left with the company during the year (R. 33, 34).

1. The Board did not make findings necessary to its conclusions

The Board did not make findings necessary to its conclusions.

Kendrick v. Commissioner, 29 F. (2d) 559, 7 A. F. T. R. 8336.

Exhibits 6 and 7 show balances left with the corporation by Mr. E. Wagner and Otto H. Wagner on January 1, 1929, at $5,432.57 and $16,096.57, respectively. The *findings* of the majority of the Board state:

> "E. Wagner and Otto H. Wagner made loans to the petitioner prior to and during 1929, and, in addition to those loans, they left with the petitioner parts of their salaries for years prior to 1929. Interest for the year 1929 on those amounts computed at the rate of 6 per cent, amounts to $1,228.69." (R. 14)

This excludes interest on 1929 salaries and bonus.

In the majority *opinion* we find these words:

> "The petitioner has failed to prove that it is entitled to any larger deduction for interest than the amount allowed by the Commissioner." (R. 17)

This excludes all interest payable to the Wagners for 1929.

There is no finding nor evidence to support the conclusion of no interest allowable.

The policy of the Wagners was to draw only a sufficient salary to live on (R. 53, 49). The balance of the undrawn salary was left with the company so that the operations could be financed (R. 49, 52, 53). Sufficient loans could not be made from outside sources (R. 62). The maximum credit was $15,000 (R. 53, 58). Interest on these loans was allowed by the Commissioner in the sum of $2,009.53 out of the $4,759.53 claimed (R. 100). He rejected an item of $2,750.00 (R. 63, 65, 66) which was "interest accrued on loans from officers" (R. 98), which item was corrected in evidence (R. 38, 39, 40, 41, 101, 102) to $1,743.73 (at 6%) and proven as interest due at six per cent on the undrawn salary of Mr. E. Wagner, for the year 1929 (R. 39) and "the interest on advances and undrawn salaries of Mr. Otto H. Wagner" (R. 40). Respondent's attorney admitted it was the correct computation of this interest item, but contended that no interest was payable in the absence of an express agreement (R. 39).

These items of advances and undrawn salaries (R. 101, 102) drew interest from the time they became payable. On January 1, 1929, there was payable to

Mr. E. Wagner $5,432.57 (R. 101) and to Mr. Otto H. Wagner $16,096.57 (R. 102). Interest accrued on these balances from January 1, 1929.

2. The calculation and allowance of interest

The calculation of interest in the tax return was erroneous. This was corrected at the hearing and the admitted evidence shows the following to be correct:

Interest due E. Wagner in 1929 @ 6% Exhibit 6 (R. 101)	$ 404.89
Interest due Otto H. Wagner in 1929 @ 6%, Exhibit 7 (R. 102)	1,338.84
Total at 6%	$1,743.73

The interest contended for was 10%, totaling $2,-906.22 (R. 101, 102). The interest rate paid to banks was 8% and 10% (R. 61, 49). The Wagners agreed upon this rate (R. 61). However, at least 6% should be allowed.

The books and Exhibits 6 and 7 show the balances, salary of each payable the first of each month, and the bonus payable October 1, 1929 (R. 101, 102, 39).

The statutes of the State of Washington provide:

> "Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per centum per annum where no different rate is agreed to in writing between the parties." Sec. 7299, Rem. Rev. Stat. of Wash.

Consequently interest accrued as set forth in the books and Exhibits 6 and 7.

> "Statutes * * * should be construed liberally in favor of the taxpayer."

Dempster Mill Mfg. Co. v. Burnet, 46 F. (2d) 604, 606, 9 A. F. T. R. 797, 799.

Pioneer Pole & Shaft Co. v. Commissioner, 55 F. (2d) 861, 10 A. F. T. R. 1198.

Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211, 3 A. F. T. R. 2958.

C. Computation of Tax and Refund

Assignments of Error:

(7) The findings of fact are not supported by the evidence (R. 32).

(8) The findings of fact are contrary to the evidence (R. 32).

(16) The finding of a deficiency for the year 1929 instead of the determination that there is no deficiency in income tax for the said year (R. 34).

1. The computation of the tax by the Board of Tax Appeals

Net income as determined by Commissioner R. 67)		$32,792.24
Less additional compensation approved by Board (R. 14)	8,000.00	
		$24,792.24
Less credit against net income less than $25,000 (Sec. 26, Revenue Act of 1928)	3,000.00	
Balance subject to tax		$21,792.24
Income tax at 11%	2,397.15	
Tax assessed and previously paid (R. 83)	1,063.71	
Deficiency determined by Board (R. 28)		$ 1,333.44

2. Petitioner's computation of tax and overpayment

Petitioner made an overpayment of income tax of $178.37 as set forth in the following calculation:

Net income as determined by Commissioner (R. 67)		$32,792.24
Less additional compensation approved by Board (R. 14)		8,000.00
Net income as determined by Board		$24,792.24
Additional deductions claimed by petitioner:		
Additional salary	$12,000.00	
Interest @ 6% on loans, advances and undrawn salaries	1,743.73	
		13,743.73
Net income, as claimed by petitioner		$11,048.51
Less credit against net income less than $25,000 (Sec. 26, Revenue Act of 1928)		3,000.00
Balance subject to tax		$ 8,048.51
Income tax at 11%		885.34
Previously paid (R. 83)		1,063.71
Overpayment		178.37

In case 10% is allowed on loans, advances and undrawn salaries, the payment refundable would be in the sum of $306.25.

CONCLUSION

We submit that the Board of Tax Appeals erred in refusing to allow the Wagners $13,000 each for compensation. The testimony is clear and uncontradicted that the allowance is reasonable, that it was authorized by the trustees during the year and that it was paid by the corporation or credited on the books during the year. The Wagners did a tremendous amount of work, including work normally done by additional employed executives. The responsibilities involved and the results accomplished warrant the allowance of the compensation claimed as a deduction.

The Board was satisfied that the Commissioner's allowance of $3,000 salary was too low. The Board could only decide upon another figure indicated by the evidence. All the evidence, opinion and factual, conclusively indicated $13,000.

The interest item was submitted to the Board on the question whether or not any interest was allowable without a resolution of the trustees. The correct calculation and the fact that it was the item disallowed was recognized and agreed to by all parties. The interest figures were taken from the books, the amounts were corrected at the trial, the statutes of the State of Washington provide for interest in such cases, and we submit that the corrected amounts should be allowed.

We finally submit that the Board arbitrarily disregarded the undisputed, uncontradicted and unimpeached testimony offered by the petitioner and arrived at conclusions which have no evidence to support them. Petitioner is entitled to the deductions

of $13,000 each for Mr. E. Wagner and Otto H. Wagner, representing compensation paid, and the interest item of $1,743.73. Properly there is no deficiency; petitioner has made an overpayment of $178.37.

Respectfully submitted,

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8415

In the United States Circuit Court of Appeals

For the Ninth Circuit

No. 8415

E. WAGNER & SON, INC., a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals

Reply Brief of Petitioner

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INDEX

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Reply Brief of Petitioner

INTRODUCTION

In his answering brief, respondent has discussed the questions involved in the same order as in petitioner's opening brief. We will reply in the same order. There is no substantial evidence to sustain the Board in refusing to allow the (A) compensation claimed for the officers and the (B) interest as cal-

culated. Furthermore, the (C) computation of tax in petitioner's brief is correct.

A. COMPENSATION OF OFFICERS

Respondent contends there is substantial evidence to support the findings of the Board, and proceeds to set forth the evidence upon which he relies, commencing on page 10 of his brief.

1. He contends that the 1929 salaries are excessive when compared with prior years. He merely refers to prior salaries of $2000 to $4000 per year and states that taxpayer failed to produce evidence to support the increase other than the opinions of the two Wagners.

He fails to realize that the amount of salaries paid during former years is no measure of the reasonableness of the salaries during those years nor for the year in question. He cites *A. David Co. v. Grissom*, 64 F. (2d) 279, 12 A. F. T. R. 395, wherein both he, the Board, and the Court had approved an immediate salary increase from $150 per month to $7000 per year.

He fails to mention:

a. The uncontradicted evidence that the salaries for prior years were inadequate (R. 51,

56). *Jones v. Helvering*, 71 F. (2d) 214, 14 A. F. T. R. 262.

b. The uncontradicted evidence that the failure to receive adequate salaries in prior years was considered in fixing compensation for 1929 (R. 42, work "justified" more; R. 46, "reasonable salary for 1929"; R. 52, "laboring man's salary").

2. He next contends (Br. 12) that taxpayer could not be considered a large company in 1929. Neither is this a measure of the reasonableness of salaries. He refers to the $15,000 to $20,000 valuation of the plant equipment in 1924, the lack of experience and capital, the small operations "at first", the value of improvements based on what money could be borrowed. He may say that taxpayer was a comparatively small company in 1929, but only in the same sense that he should say that a $13,000 salary was a comparatively small salary in 1929.

He cites *H. L. Trimyer & Co. v. Noel*, 28 F. (2d) 781, 7 A. F. T. R. 8221, wherein a salary of $15,000 and total salaries of $23,850 were held reasonable in a corporation with invested capital of only $15,000 and a gross business of $170,503.39.

He admits 1929 was a "big year" for taxpayer. But he fails to mention:

a. The value of the plant, property and equipment of $110,520.78 to $145,373.00 in 1929 (R. 86) and a gross business exceeding $220,000.00 (R. 36).

b. The capital employed in 1929 of $105,-104.45 to $117,774.50 (R. 88).

c. That although the *bank* credit for payrolls was limited to $15,000 (R. 44, 60) petitioner had total credits of more than $60,000 at the close of 1929 (R. 87).

d. The long experience of E. Wagner in the saw mill business beginning in 1888 in Castle Rock (R. 59) and continuing to this saw mill (R. 42, 57).

3. He next contends (Br. 13) that the difficulties involved in financing the business are evidence that the corporation could not afford to pay these salaries. In other words, even though the business made a fair profit in 1929 (R. 65), the excessive struggle involved in financing the business should be without reward, because that struggle evidences inability to pay adequate salaries.

He fails to consider:

a. That the Wagners sacrificed and dug up every cent they could for the business in order

to keep it going (R. 56). They made advances and left portions of their salaries with the company. They had everything at stake. The company was "under financed" (R. 44). They had to make a go of the business. It was an extra hazardous undertaking. Banks were cautious. "Loans to saw mills were a poor risk" (R. 44). Credit was limited. The Wagners had to actually personally endorse the company's notes before the company could get any money in 1929 (R. 44), even the limited amounts necessary for payrolls. This was to that extent a waiver of the advantage of limited liability in corporate operation. This *added responsibility* should be considered in determining reasonable salaries.

b. That seasonal operations required available cash, and regardless of the age of a business, difficulty along this line is not unusual. It is more to the credit of these men that they managed to keep the business going and successfully making money in spite of the hardships.

c. The limit of "$15,000 from outside sources" (Br. 13) was "the maximum bank credit for payrolls" (R. 44, 60), not the maximum amount they had borrowed (R. 87).

d. The ability to pay salaries is not based upon freedom from financial struggles.

e. As was the case in former years, the failure to withdraw salaries in cash is no "indication that the amounts agreed upon for 1929 were larger than the petitioner could afford to pay" (Br. 13). Leaving money with the company evidences extra added burden and effort, and should be considered.

4. He next contends (Br. 13) that the nature of the duties of Otto Wagner had not "changed materially in that year except for longer hours" (R. 44). This is not supported by the evidence. We must insist that the work and salaries of former years is no measure of the reasonableness of salaries for those years nor for the year in question. He does not attempt to establish the reasonableness of the salaries of former years. Although he mentioned the longer hours in 1929 and the fact that the Board of Tax Appeals was satisfied that his (Commissioner's) allowance was not adequate, he fails to mention the evidence serving as a measure by which the Board fixed the salary of Otto Wagner for 1929.

5. He next contends (Br. 15) that Mr. E. Wagner "was 74 years old in 1929." This contention, based on error of fact, raises an unfair inference; a fur-

ther one that the value of an officer's services would automatically be impaired if he were over 70 years of age. However, Mr. E. Wagner was only 69 years of age in 1929 and "the state of his heath was firm" (R. 51). He was 74 at the time of the trial in this proceeding in 1934 (R. 56, 2).

6. He next contends (Br. 15, 16) that the duties of Mr. E. Wagner were not "heavier than they were in prior years." He seems to belittle the extra subdivision work, construction of houses, duty at the manufacturing plant, timber scouting, ability to earn "more than $13,000 in other lines of work" and leaving for rest early in October. These references, as well as the other evidence referred to in the Record indicate "heavier" duties. In addition:

a. Mr. E. Wagner was on the job nine months of the year in question. The heavy duties broke his health.

b. Although the superintendent did work longer in the fall of 1929 and did put in more time in that sense, Mr. E. Wagner worked all day and far into the night (R. 58) while the superintendent only put in one shift at the mill and this only for the mill season. He put in about half the time the Wagners were putting in (R.

55). The respondent fails to recognize that it is not the number of hours that is controlling; for this would completely ignore the fact that the value of Wagner's services was measured also by his experience, business and trade contacts, financial liability, ripened executive judgment, and the burden of the responsibility for success of this enterprise. That this is true is fully borne out by the fact that petitioner made substantial profit during the year under review.

c. The Board held the salary allowed by the Commissioner was inadequate. It was satisfied there were heavy duties in 1929.

7. He next contends (Br. 16, 17) that the 1929 salaries were a distribution of profits in disguise. The Board made no such finding. He refers to the fixing of increased salaries in June, 1929, when they "realized they were going to have a big year." The officers fully recognized that they had *earned*, and for the year 1929 would earn much more substantial compensation than was then being or had theretofore ever been paid them. The volume of business and the amount of the probable earnings of the petitioner would then for the first time in its history permit the payment of reasonable compensation.

While the respondent seeks to infer that the increased compensation was improper merely because the officers realized that the earnings of the company would be adequate to do so. This fact in no way minimizes or negatives the propriety of the action taken; for it would indeed be a challenge to their sound business judgment if they had approved of more substantial compensation without knowledge or reasonable expectation that the company would be *able to pay* the compensation authorized. The work and responsibilities determine the reasonableness of the salaries.

Central Wisconsin Creamery Co., 15 B. T. A. 396.

William S. Gray & Co. v. U. S., 68 Ct. Cl. 480, 35 F. (2d) 968, 8 A. F. T. R. 9798.

Francesconi & Co., 10 B. T. A. 658.

Livingston & Co. v. U. S., 67 Ct. Cl. 626, 7 A. F. T. R. 9108.

These salaries were reported in personal income tax returns. The respondent does not complain of this nor of the income taxes paid on them.

In summarizing, the Commissioner relies, for his substantial evidence, upon these assertions:

(1) The small salaries for 5 years prior to 1929. (Admitted).

(2) Petitioner was a small company in 1929. (Comparative statement not borne out by evidence.)

(3) Petitioner had financial difficulties in 1929. (Admitted.)

(4) "Longer hours" was the only material change in duties of Otto Wagner. (Wholly unsupported by the evidence.)

(5) Mr. E. Wagner was an old man. (He was 69 and capable.)

(6) The duties of Mr. E. Wagner were not heavier than in former years. (Also wholly unsupported by the evidence.)

(7) Salaries were profits in disguise. (Unwarranted inference from any of the evidence.)

He now suggests that the findings of the Board are partially unsupported by the evidence (Br. 3 n 1.)

May we again quote from the Board member who conducted the hearing, the Honorable Stephen J. McMahon, who in his dissenting opinion, concurred in by the Honorable J. Russell Leech, states:

> "The record fails to disclose evidence to support a finding of fact or holding that a reasonable allowance as compensation for services rendered by the Wagners for the year 1929 is less than $13,000 each. The witnesses for petitioner

were intelligent, candid and in all respects credible; their testimony was not impeached; and no countervailing evidence was offered by respondent." (R. 20.)

B. INTEREST

The argument of respondent concerning the allowance of interest is based upon the assumptions that there was no obligation to pay interest and that there is no evidence of the correct amount of interest.

1. He first relates (Br. 18, 19) that the item in dispute is $2750 "interest accrued on loans from officers." The Court is not bound by statements in the opinion.

Commissioner v. Bonwit, 87 F. (2d) 764, 766. The amount of this item was corrected in evidence to $1743.73 (at 6%, and $2906.22 at 10%) (R. 38, 39, 40, Exhibits 6 and 7, R. 101, 102), and is properly referred to in assignments of error (5), (6), (14) and (15). Respondent disregards these corrections (Br. 18 n 2) for the reason the Board made no findings concerning them. That is why we are appealing this case. Both the respondent and the Board disregarded the evidence (R. 38, 39, 40, 101, 102). The attorney for respondent agreed that Exhibits 6 and 7 (R. 101, 102) showed the correct computation of interest at six per cent and ten per

cent on the advances and undrawn salaries (R. 39, 40). There is no question but that this is the item in dispute.

2. He next contends (Br. 19) there was no obligation to pay interest. However, he relates that according to the books interest was actually allowed. Then, it must have been agreeable or else it would not have appeared there. He then relates (Br. 20) that interest is not allowable "unless it is the subject of an express agreement or is specifically allowed by statute or by some well established business custom." The statutes and cases of the State of Washington (R. 24) allow interest at 6 per cent in case of *forbearance* as here, and on loans where no other rate is agreed to.

Sec. 7299, Rem. Rev. Stat. of Wash. (R. 24).

Benner v. Billings, 107 Wash. 1, 181 Pac. 19.

Dornberg v. Black Carbon Coal Co., 93 Wash. 682, 161 Pac. 845.

The advances are definite loans and such interest is also allowable.

He cites (Br. 21) and relies upon the case of *Miller Safe Co.*, 12 B. T. A. 1388, contending no interest is payabe on advances without an agreement. The Board and Commissioner there allowed 6% interest in the sum of $2,137.45 for the current taxable period

on all advances, although, according to the stipulated facts, "when the foregoing advances were made to petitioner it was considered by both the borrower and lender that they were not formal loans, and that they would be repaid promptly out of expected profits, which, however, did not materialize. Neither party intended and there was no agreement for payment of interest on these advances, and it was only due to the fact that the petitioner made a profit in 1919 that this interest was paid." Not only was no statute cited as authority for the calculation of interest by the lenders, but the findings in the case disclose that the petitioner kept its books on the accrual basis and that the additional interest claimed as a deduction represented accruals thereof for *nine previous years*. The interest accrued for the current period under review had been allowed by the respondent. It is thus seen that the case cited by respondnt not only is no authority for the disallowance of the deduction of interest sought by the petitioner in the instant case, but in fact inferentially supports its contention.

The cited *Dugan* case (Br. 21) is one of an unliquidated balance on a drawing account not due. Interest is allowed to partners on advances and undrawn salaries. In *Keiley v. Turner*, (Md.) 31 Atl. 700, 703, the Court states:

"The record shows us that Keiley allowed large portions of his salary to remain in the hands of the firm. These sums were used for its benefit and were contributions on his part to its capital. He ought to be paid interest on these amounts; not on the ground that payment was withheld by the firm, but for the reason that he furnished money which was used in the transaction of its business. Payments of salary were due monthly, and from the time they became due, interest is properly chargeable for his benefit."

Matthews v. Adams (Md.), 35 Atl. 60.

Coldren v. Clark (Ia.), 61 N. W. 1045.

3. He next contends (Br. 22) that the salaries and bonuses were not payable prior to the end of 1929. "The books, as closed, show that the salaries were payable monthy, and the bonuses were payable on October 1, 1929, and respondent has made no contention to the contrary. In fact, as stated, he in effect agreed that the exhibits were correct, and such exhibits treat the compensation as payable prior to the close of the year. Furthermore, in the absence of any agreement to the contrary, it is the universal custom to treat salaries as accruing monthly even though they are fixed at a yearly rate. Otherwise, people, dependent upon their salaries would be unable to meet living expenses. In neither the case of the salary nor the case of the bonus is interest claimed before the date on which the payment was duly au-

thorized and respondent has raised no question as to this. The bonuses were payable forthwith; and being on the accrual basis, they were accruable when authorized, and the salaries were accruable at the end of each month. There is nothing in the record to require or justify a failure or refusal to accept these exhibits for the purpose for which they were offered and received." (R. 23.) Opinion of Honorable Stephen J. McMahon. (R. 101, 102, Exhibits 6 and 7.)

The Commissioner's contention does not apply to any loans or advances left with the company as of January 1, 1929.

4. He next contends (Br. 23-26) there is no showing as to the correct amount of interest. He disregards Exhibits 6 and 7 (R. 101, 102) admitted for that very purpose, agreeable to respondent's attorney (R. 38, 39, 40). The correct amount is $1,743.73 (at 6% and $2,906.02 at 10%).

The respondent contends (B. 24) that Mr. E. Wagner drew $5000 out of his 1929 salary in October. He cites pages 60 and 61 of the Record. It does not sustain him. It does not state that $5000 was drawn from 1929 salary. At most, the Record is ambiguous on this point. The Board in its findings makes this statement: "E. Wagner and Otto H.

Wagner did not withdraw any of the salary or bonus authorized by the petitioner for the year 1929." (R. 14.) Mr. E. Wagner regarded his balances with the company as one account. He bought his steamship ticket in September. Counsel tries to infer the ticket cost $5000. The court could take judicial notice that a steamship ticket to New Zealand would cost but a small fraction of that sum. However, the other evidence clears up this point. He "drew a thousand dollars at a time" (R. 60). He drew "approximately $5000" (R. 60). Exhibit 6 (R. 101) shows he had drawn approximately $5000 from March 1, 1929, to November 1, 1929, $5,179.22 to be exact. He stated he still had a balance due of $10,000 (R. 61). He was hard of hearing at the time of the trial (R. 60). Furthermore, he was testifying from memory. Five years had passed. The exhibits were agreed to be the exact figures (R. 38, 39, 40). They show the amount on which interest was due, dates payable, balances after withdrawals, together with dates (R. 101, 102).

He next contends (Br. 25) that the petition for review states that he allowed interest on salary and advances of prior years during 1929. On the following page of his brief (Br. 26) he interprets the petition for review as stating that "interest for prior

years was allowed as a deduction." We must not be confused in this. In the first place the petition for review is not evidence. The admitted evidence is clear as to the issues and the facts. May we clarify this point for respondent. Petitioner made deductions in its income tax return for 1929 covering the 1929 interest on balances of advances, loans, salaries and bonuses due officers as indicated in the evidence. It also made deductions in its income tax return for 1929 covering the 1929 interest on loans to outsiders made prior to and during 1929. Petitioner had deducted interest in prior tax returns for prior years which respondent had allowed. Respondent allowed interest during this year on loans to outsiders made prior to 1929. But respondent disallowed interest during 1929 on loans, advances, salaries and bonuses left by the officers with petitioner during 1929. Interest for 1929 to outsiders was allowed in the sum of $2,009.53 (R. 66, 83, 98, 100).

Respondent refers (Br. 26) to this item of $2,009.53 as if there were some mystery surrounding it. This item was not in issue inasmuch as it was interest on loans and obligations to *outsiders*. Respondent contends these items did not exceed $15,000 (Br. 26) but we have shown them to be from $22,707.48 to $60,558.26 (R. 87). The $15,000 refer-

ences cited by respondent are "bank credit for payrolls operation during 1929 was $15,000" (R. 44), "the rate of interest" in the vicinity of Seattle "was ten per cent" (R. 49), "our bank credits would only allow us $15,000" (R. 60). The $15,000 item was the limit of bank loans.

C. COMPUTATION OF TAX

Counsel for the respondent point (Br. 27) with somewhat light disdain to an asserted computation by the petitioner (p. 21 of its brief) of the tax "as it contends it should be if the Board's decision is reversed" (Br. 27), and ventures the suggestion that such a computation has no proper places in briefs, and calls "attention to the fact that the petitioner is in error in figuring the tax at 11 per cent since the rate given in the 1928 Act is 12 per cent." (Br. 27.)

But upon reference to page 21 of the petitioner's brief it will be noted that the statement merely sets forth, for convenience of reference, the computation of the tax as submitted by the respondent under Rule 50 (R. 17, 28) on which the final order was based.

The section of the Revenue Act of 1928 cited by respondent's counsel is correctly set forth in the Appendix to his brief (Br. 28), but obviously overlook-

ing the fact that the rate of tax applying to the taxable year 1929 is 11 per cent, as used in the computation. (U. S. C. Sup. III, title 26, Sec. 2013, 46 Stat. at L. 47, Public Resolution No. 23, 71st Congress, approved December 16, 1929, and effective January 1st of that year.)

CONCLUSION

We submit that respondent has been unable to discover substantial evidence in the record to support his contentions. We respectfully contend there is no "evidence to support a finding of fact or holding that a reasonable allowance as compensation for services rendered by the Wagners for the year 1929 is less than $13,000 each." Furthermore, the record is clear and uncontradicted that interest is due on the loans, advances and salary balances. It should be allowed. Finally, the tax computations by petitioner are correct.

Respectfully submitted,

ELDER & HILL,
ANDREW G. ELDER,
CYRIL D. HILL,

Attorneys for Petitioner.

Dexter Horton Building,
Seattle, Washington.

No. 8505

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Debtor.

GLOBE GRAIN AND MILLING COMPANY, INDUSTRIAL OIL PRODUCTS CORPORATION, and MURRAY OIL PRODUCTS COMPANY,

Appellants,

vs.

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Debtor.

GLOBE GRAIN AND MILLING COMPANY, INDUSTRIAL OIL PRODUCTS CORPORATION, and MURRAY OIL PRODUCTS COMPANY,

Appellants,

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Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

Names and Addresses of Solicitors.

For Appellants:

HIBBARD & KLEINDIENST, Esqs.,

LOUIS KLEINDIENST, Esq.,

121 East Sixth Street,

Los Angeles, California.

For Appellee:

LESLIE S. BOWDEN, Esq.,

433 South Spring Street,

Los Angeles, California;

FRANK MERGENTHALER, Esq.,

548 South Spring Street,

Los Angeles, California.

United States of America, ss.

To American Marine Products Company and its attorneys, Leslie S. Bowden and Frank Mergenthaler..... ..... Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 3rd day of April, A. D. 1937 pursuant to order allowing appeal of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain matter numbered No. 29145 H in the records of said court wherein the American Marine Products is a debtor under Sec. 77-B of the Bankruptcy Act and Globe Grain and Milling Company, Industrial Oil Products Corporation and Murray Oil Products Co. are interveners and you are required to show cause, if any there be, why the order denying the above parties to intervene in the said matter mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable H. A. Hollzer
United States District Judge for the Southern District of California, this 4th day of March, A. D. 1937 and of the Independence of the United States, the one hundred and sixty-first.

H. A. Hollzer
U. S. District Judge for the Southern District of California

Receipt of Copy of above Citation is hereby acknowledged this 4th day of March, 1937.

Leslie S. Bowden and
Frank Mergenthaler

By Frank Mergenthaler

Attorneys for American Marine Products Company, Debtor above named.

(on back, stamped)

Filed R. S. Zimmerman Clerk
9:23 Mar 4 1937 A. M.
By R. B. Clifton
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	)	No. 29,145-H
	)	
AMERICAN MARINE PRODUCTS	)	
COMPANY, a corporation,	)	
	)	
Debtor.	)	

DEBTOR'S PETITION FOR ITS CORPORATE REORGANIZATION

TO THE HONORABLE JUDGES OF THE DISCOURT OF THE UNITED STATES:

The petition of the AMERICAN MARINE PRODUCTS COMPANY, the Debtor herein, respectfully shows that:

1. The Debtor is a corporation duly organized and existing under the laws of the State of California, and for the six months last past, or for the greater portion thereof, has had its principal office and place of business at 548 South Spring Street, in the City of Los Angeles, State of California, within this Southern District of California, Central Division.

2. The Debtor is not a municipal, insurance or banking corporation nor a building or loan association nor a railroad corporation, but is a commercial corporation which could become a bankrupt under Section 4 of the Bankruptcy Act.

3. The filing of this petition has been duly directed by the Board of Directors of the Debtor corporation.

4. The nature of the Debtor's business is producing and selling fish oil and fish meal.

5. The Debtor has not been adjudged a bankrupt and no prior proceeding involving the sequestration of its assets, etc. is pending in any Court.

6. The Debtor is unable to meet its debts as they mature and desires to effect a plan of reorganization.

7. In brief description the Debtor's assets and liabilities are set forth in the annexed "Exhibit A" as of December 31, 1936.

8. The Debtor's capital stock consists of the following:

Authorized capital stock
Preferred: 50,000 shares no par value
Common: 250,000 " " " "
Outstanding capital stock
Preferred: 45,500 shares no par value
Common: 91,000 " " " "

9. A description in brief of the financial condition of said Debtor and a statement of the facts showing the Debtor's need for the relief herein sought are as follows:

The principal asset of the Debtor is the Steamship Currier. This steamship is subject to a certain first mortgage given to secure a promissory note in the sum of $25,000.00, dated July 8, 1936, due July 8, 1937, bearing interest at the rate of five per cent (5%) per annum. Debtor purchased the Steamship Currier, an oil tanker, during the month of August, 1936, and immediately com-

menced converting the same into a floating factory for the production of fish oil and fish meal, which work could have been completed on or about November 15, 1936, but for the reason that on or about the 28th day of October, 1936, a general strike was declared by the Maritime and Shipyard Unions which made it impossible to complete the work on said ship within the time above stated, and for said reason it was not possible to operate the said floating factory until the middle of December, 1936, and thereby Debtor has been deprived of the revenue which could have been obtained from its products during the months of November and December, 1936.

Prior to the time said floating factory was completed Debtor had entered into certain agreements whereby Debtor agreed to sell certain quantities of fish oil and fish meal subject to production from the operation of said floating factory and prior to the time said floating factory was completed Debtor had entered into certain contracts with fishermen who had agreed to supply Debtor with quantities of fish for the production of fish oil and fish meal, however, because of the general strike hereinbefore mentioned Debtor was not able to operate said floating factory within the time estimated and a number of said fishermen abandoned their contracts with said Debtor. Because of the abandonment of the contracts by said fishermen, Debtor is not able to secure a sufficient quantity of fish to operate and sell to the buyers under the contracts heretofore mentioned, fish oil and fish meal at a profit, but Debtor is able to operate and sell its products

on the open market at the prevailing prices, which are higher than those specified in the contracts hereinbefore mentioned and Debtor believes that if it be permitted to operate said floating factory ship and to reject the executory sales contracts hereinbefore mentioned that it will be able to pay to all of its creditors the full amount due them within a limited period of time.

Under the plenary power of this Court under Section 77 (b) of the Bankruptcy Act a plan of reorganization can be worked out which will be fair to all of the creditors and the mortgagee under the mortgage hereinbefore referred to. The Debtor desires in the interest of such mortgagee and creditors as well as in its own interest to submit such a plan as will permit it to be placed upon a sound business basis and to enable it to earn sufficient money to eventually pay off all of its indebtedness without injury to any general creditor or the mortgagee, and thereby preserve and protect its assets for the benefit of its stockholders.

The Debtor submits that this is peculiarly a case for the protection of the Federal Courts contemplated by Section 77 (b) of the Bankruptcy Act, for the following reasons:

In its business it uses a certain type of sardine fish and a large quantity of said fish can be obtained from the high seas off the coast of Northern and Southern California between the months of September and April and it is feared that certain of Debtor's creditors may libel its floating factory ship which would thereby paralyze the same and effect not only the interests of all of the general creditors of Debtor but the interests of its stockholders as well.

WHEREFORE your petitioner prays:

1. That this petition be approved as properly filed under Section 77 (b) of the Bankruptcy Act, and that further proceedings be had in accordance with said section;

2. That the Debtor be continued temporarily in possession of the Debtor's estate;

3. That a hearing be held within thirty days after the approval of this petition, at which hearing, or any adjournment thereof, the judge shall make permanent the continuance of the Debtor in possession or appoint a trustee or trustees in its place;

4. That the Debtor be required to give notice of such hearing in such manner as the judge may direct, to creditors and stockholders and by publication at least once a week for two successive weeks;

5. That the Debtor be vested not only with all the powers of a trustee in bankruptcy but those, also, of a receiver in equity not inconsistent with Section 77 (b) of the said Bankruptcy Act;

6. That the Debtor be authorized, directed and empowered to continue its business, subject to the control of the judge by orders made from time to time in this proceeding, and for cause shown, be authorized to issue certificates for cash, property, or other consideration approved by the judge for such lawful purposes, and upon such terms and conditions and with such security and such priority in payment over existing obligations, secured or unsecured, as may be lawful;

7. That the Debtor be directed to file schedules that will disclose the conduct of the Debtor's affairs and the fairness of any proposed plan of reorganization, in accordance with Section 77 (b) of the Bankruptcy Act;

8. That contracts of the Debtor, executory in whole or in part be rejected, or amended where rejection or amendment thereof is proper;

9. That the Debtor be permitted, within a time to be fixed by the Judge, to submit a plan or plans or reorganization;

10. That a reasonable time be determined within which to file claims, and, for the purposes of this plan and its acceptance, the division of creditors and stockholders into classes be determined;

11. That all and every suit and proceeding against the debtor to fix or enforce a lien upon its property, or to enforce any claim to any property in its possession or control, be stayed, and all persons be enjoined from interfering in any way with the Debtor's possession and its conducting of business under the order of the judge; and that, in general, such orders be made by the judge from time to time as shall be proper in the reorganization of the Debtor corporation in accordance with the provisions of Section 77 (b) of the Bankruptcy Act; and that such other and further relief may be granted as to the judge may seem just.

AMERICAN MARINE PRODUCTS COMPANY, Debtor

By J. HARTJE MUELLER
President.

Petitioner.

DATED: December 31, 1936.

LESLIE S. BOWDEN
FRANK MERGENTHALER
Attorneys for Petitioner

WHEREAS, it is to the best interest of this Corporation, its stockholders and creditors that a petition be filed by it in the District Court of the United States in and for the Southern District of California, Central Division, under Section 77B of the Bankruptcy Act.

BE IT RESOLVED that the officers of this Company be and they are hereby authorized and empowered to institute and prosecute a proceeding for the reorganization of this Corporation under Section 77B of the Bankruptcy Act and to employ counsel for such purpose, said proceeding to be instituted immediately.

BE IT FURTHER RESOLVED that application be made to the said Court to continue the Corporation in possession of its assets and property.

The undersigned, FRANK MERGENTHALER, does hereby certify that he is the duly elected and qualified Secretary of the AMERICAN MARINE PRODUCTS COMPANY, a corporation duly organized and existing under the laws of the State of California, and that the foregoing is a true and correct copy of a resolution of the Board of Directors of the said AMERICAN MARINE PRODUCTS COMPANY adopted at a special meeting of said Board held on the 29th day of December, 1936.

FRANK MERGENTHALER

Secretary of

(Corporate Seal) American Marine Products Company

EXHIBIT A

ASSETS

S. S. Currier, 4711 tons gross	$698,129.00
Cash on hand	26,430.25
Claims against insurance companies	3,724.00
	$728,283.25

LIABILITIES

Mortgage due July 8, 1937	$ 25,000.00
Interest on Mortgage to 12/31/36	447.89
Trade acceptances payable	30,000.00
Contracts payable	26,025.24
Promissory Notes payable (Incl. int. to 12/31/36)	15,816.58
Accounts payable	119,990.00
	$217,279.71

State of California }
County of Los Angeles } ss

J. Hartje Mueller, being by me first duly sworn, deposes and says: That he is the President of the American Marine Products Company, a corporation, the Debtor in the above entitled matter, that he has read the foregoing Debtor's Petition for Its Corporate Reorganization and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon information or belief and as to those matters that he believes it to be true. That he makes this verification for and on behalf of said corporation.

J. HARTJE MUELLER

Subscribed and sworn to before me this 31st day of December 1936

(Notarial Seal) Delilah Otey Fawcet

Notary Public in and for the County of Los Angeles States of California

Filed R. S. Zimmerman, Clerk 4:06 Dec. 31, 1936 P M
By R. B. Clifton Deputy Clerk

[Title of Court and Cause.]

ORDER APPROVING DEBTOR'S REORGANIZATION PETITION AUTHORIZING DEBTOR'S CONTINUANCE IN POSSESSION, ETC.

The petition of the AMERICAN MARINE PRODUCTS COMPANY, the debtor, having been duly filed herein; and it appearing therefrom that the said debtor is a corporation that could become a bankrupt under Section 4 of the Bankruptcy Act, and is unable to meet its debts as they mature, and desires to effect a plan of reorganization; and the judge being satisfied that said petition complies with Section 77B of the Bankruptcy Act and has been filed in good faith; and it further appearing that it is proper that said debtor be authorized to continue in possession under the direction and control of the judge, with power to conduct the business and pay the expenses of so doing, Now it is

ORDERED, that said petition be and it hereby is approved as properly filed under Section 77B of the Bankruptcy Act; and it is further

ORDERED, that, subject to the direction and control of the judge and until further order herein, the debtor be and it hereby is authorized to continue in possession and control of all of its assets, properties, lands and estates, rights and franchises of whatever kind and description and wheresoever situated, and to have the same powers as those exercised by a receiver in equity and/or trustees in bankruptcy to the extent consistent with the provisions of Section 77B of Chapter 8 of the Acts of Congress relating to bankruptcy; and it is further

ORDERED that, not later than January 11, 1937, the Debtor shall file with the Clerk of this Court a list of its creditors and a statement of the assets and liabilities of the Debtor as of midnight December 31, 1936, and within ninety days after the close of each quarter year thereafter shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the preceding quarter year, together with a summary statement of the revenues and expenses of the Debtor for the preceding quarter year period; and it is further

ORDERED that the Debtor shall, within ten days after the entry of this order, cause notice to be mailed to each known creditor of the Debtor at his last known postoffice address, to all the stockholders of the Debtor, as the same may appear on the books of the Debtor; and to cause publication of such notice to be made at least once a week for two successive weeks in the Los Angeles Daily Journal, a newspaper published and having a general circulation in the City of Los Angeles, that a hearing will be held herein before the judge of this Court in Room No. 311 of the Federal Building, on the 25 day of January, 1937, at Two o'clock in the afternoon, to determine whether such appointment of such Debtor shall be made permanent or shall be terminated, and the Debtor continue in possession, or whether a trustee or trustees or an additional trustee or trustees shall be appointed by the Court; and it is further

ORDERED that the Debtor be and it hereby is authorized and directed, pending further order herein to conduct, manage, maintain, operate and keep in proper condition and repair the assets, properties and business of the

debtor wherever situated, whether in this State, judicial circuit and in the United States of America or elsewhere; and to manage, operate and conduct its business; and to this end to exercise its authority and franchises and discharge all duties obligatory upon it; and to employ and discharge and fix the compensation of all others, attorneys, managers, superintendents, agents and employees; to collect and receive the income, rents, revenues, tolls, issues and profits of said assets, properties and business; to collect all outstanding accounts, notes and interest on securities belonging to it, and, to the extent necessary to protect and preserve the assets, properties and business of the Debtor, to make and pay for additions and betterments to the properties of the Debtor, all according to law, and subject to such supervision and control by the judge or the Court as may be exercised by further orders entered herein; and it is further

ORDERED that the Debtor be and it hereby is authorized, in it discretion, from time to time and until further order herein, out of funds now or hereafter coming into its hands to pay:

(a) All necessary current expenses of the Debtor in preserving the assets and properties and in conducting the business of the Debtor, including among other expenses the wages, salaries and compensation of the officers, attorneys, counsel, managers, superintendents, agents or employees retained by the Debtor, also all sums now due or hereafter becoming due to other persons or corporations for the necessary occupation and services, jointly or otherwise, of buildings and premises and any other services necessary to the continued operation of the Debtor's business, and such sums as may be necessary to comply with

the obligations of the Debtor under contract by virtue of which said occupation, use or services may now or hereafter be enjoyed; but such payments shall not constitute affirmations of said contracts or any of them;

(b) The costs of maintaining the corporate existence of the Debtor, including the necessary expenses for the preservation of the records and the registration and transfer of its stocks and bonds and trustee's charges under indentures, under which securities of the Debtor have been or may be issued;

(c) The expenses of printing pleadings, motions, petitions, and orders now on file or hereinafter filed in this case, which are reasonably necessary to be printed in such quantities as shall provide copies for the use of the Court, the Trustees, the Debtor, the parties to the cause, and such others as may have a substantial interest therein; such expenses to be taxed as costs in this case; and it is further

ORDERED that, pending further order in the premises, the Debtor is authorized and empowered to institute or prosecute in any court, or before any tribunal of competent jurisdiction, all such suits and proceedings as may be necessary or proper for the recovery or protection of the properties or rights of the Debtor, and to make settlement of any thereof; and likewise to defend any actions, claims, proceedings or suits which are now pending against the Debtor, or which may hereafter be asserted or brought in any court or before any officer, department, commission or tribunal, to which the debtor shall be a party; but no payment shall be made by the Debtor in respect of any

such claims, actions, proceedings, or suits; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon or right in the properties or funds in the possession of the Debtor that otherwise would not exist; and it is further

ORDERED that all persons, firms, and corporations, their officers, agents, attorneys, servants and employees, including sheriffs and marshals, whether creditors or claiming to be creditors or having or claiming to have any right, title or interest in or to any property of the Debtor, be and they hereby are enjoined and restrained from interfering with, attaching, garnisheeing, levying upon, or enforcing liens upon, removing, or in any manner whatsoever interfering with, disturbing or attempting to interfere with or disturb any portion of the assets, goods, moneys, properties and premises belonging to or in the possession of the Debtor, or any agent of the Debtor, and from taking possession of any of the property in the Debtor's possession or control, and from interfering in any other manner with the Debtor's discharge of its duties and obligations in the maintenance and operation of said assets, properties and business under the orders of the judge or of this Court, or from instituting or prosecuting or continuing the prosecution of any action at law or proceeding in equity or bankruptcy against the Debtor in any court of law or equity or bankruptcy or before any association, organization, commission, board, referee or other court or tribunal, or otherwise; and it is further

ORDERED that full right and jurisdiction be and it hereby is reserved to make, from time to time, such orders as the judge shall deem proper, including among others, orders fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, requiring the Debtor to file such schedules and submit such information as may be necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, determining a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed or evidenced and allowed, for creditors and stockholders into clases according to the nature of their respective claims and interests, and in general, such orders amplifying, extending, limiting or otherwise modifying this order as to the judge may at any time seem proper.

DATED: December 31st, 1936.

H. A. HOLLZER,
District Judge

Filed R S Zimmerman Clerk 4:48 Dec 31, 1936 p m
By R B Clifton Deputy Clerk

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the 18th day of January, in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable GEO. COSGAVE, District Judge.

In the Matter of	)	
	)	
American Marine Products	)	No. 29145-H Bkcy.
Company, a corp.,	)	
Debtor.	)	

This matter coming on for hearing on petition of Vegetable Oil Products Company, Inc., to Intervene; C. W. Hobson, Esq., appearing for intervenor; Leslie S. Bowden and Frank Mergenthaler, Esqs. appearing for debtor;

C. W. Hobson, Esq., makes a statement in support of petition;

Leslie S. Bowden, Esq., makes a statement in opposition;

It is ordered petition to intervene is hereby granted.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the 25th day of January, in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

In the Matter of	)	
	)	
American Marine Products Co., a corp.,	)	No. 29145-H Bkcy.
Debtor.	)	

This matter coming on for (1) hearing on order directed to Stockholders to show cause why order continuing debtor in possession should not be made permanent or said order be terminated and trustee appointed; (2) hearing petition of Pacific Coast Engineering Company to transfer proceedings to the Northern District of California, Southern Division; David D. Oliphant, Jr. Esq., appearing for petitioner; L. S. Esselstyn, Esq., appearing for Currier S. S. Co.; L. Kleindienst, Esq., appearing for Globe Grain & Milling Co.; Leslie S. Bowden and Frank Mergenthaler, Esqs., appearing for debtor; Stuart L. Lapp, Esq., appearing for Hamonson & Co.; W. C. Shelton, Esq., appearing for Wilbur Ellis Co.; C. W. Thomson, Esq., appearing for Vegetable Oil Products Co.; Paul Fussell, Esq., appearing for certain stockholders; and H. A. Dewing being present as official stenographic reporter;

L. Kleindienst, Esq., asks leave to file petition in intervention of Globe Grain & Miling Co., and there being no objection, it is ordered filed and ordered stand submitted.

D. D. Oliphant, Jr., and L. S. Esselstyn, Esqs., then state they object to intervention;

W. C. Shelton, Esq., makes statement;

D. D. Oliphant, Jr., Esq., argues in support of (2);

J. Hartje Mueller is sworn and testifies on examination by D. D. Oliphant, Jr., L. S. Bowden, C. W. Thomson, Esqs., and by the Court;

Paul Fussell, Esq., makes statement;

At 4:30 p. m. after a twenty minute recess, court reconvenes, and all being present as before,

J. Hartje Mueller resumes the stand and testifies further on examination by D. D. Oliphant, Jr., Esq.,

Frank Mergenthaler is sworn and testifies on examination by L. S. Bowden, Paul Fussell, D. D. Oliphant, Jr., Esqs., and by the Court;

D. D. Oliphant, Jr., Esq., argues further in support of (2);

L. S. Bowden, S. L. Lapp, C. W. Thomson, L. S. Esselstyn, Paul Fussell and L. Kleindienst, Esqs., argue in opposition to (2);

The Court denies petition to transfer to Northern District of California and an exception is noted to petitioner.

It is ordered this matter is hereby continued to January 26, 1937, at 2:00 p. m. for further hearing on order continuing debtor in possession, etc.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof. in the City of Los Angeles, California, on Tuesday, the 26th day of January, in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

In the Matter of	)	
	)	
American Marine Products Co., a corp.	)	No. 29145-H Bkcy
	)	
	)	
Debtor.	)	

This matter coming on for hearing on order directed to stockholders to show cause why order continuing debtor in possession should not be made permanent or said order be terminated and trustee appointed; David D. Oliphant, Jr., Esq., appearing for Pacific Coast Engineering Co.; Frank Mergenthaler, Esq., appearing for Currier S. S. Co.; L. Kleindienst, Esq., appearing for Globe Grain & Milling Co.; Paul Fussell, Esq., appearing for Battson, Barnes & Lester, Inc., & Nelson Douglas & Co.; Leslie S. Bowden, and Frank Mergenthaler, Esqs., appearing for

the debtor; Stuart L. Lapp, Esq., appearing for Hamons & Co.; G. W. Burch, Esq., appearing for Wilbur Ellis Co.; C. W. Hobson, Esq., appearing for Vegetable Oil Products Co.; Charles G. Murray and R. W. Jones being present as stenographic reporters;

At 2:45 p. m. counsel answer ready, and it is ordered to proceed;

L. S. Bowden, Esq., makes statement asking that debtor remain in possession;

S. L. Lapp and Paul Fussell, Esqs., state number of shares of stock held by their clients and object to the continuance of debtor in possession;

Frank Mergenthaler, Esq., states that Currier S. S. Co. wishes debtor to remain in possession;

L. Kleindienst, Esq., makes statement in support of petition in intervention of Globe Grain & Milling Co.;

C. W. Hobson, Esq., makes statement on behalf of Vegetable Oil Products Co. and objects to debtor remaining in possession;

G. W. Burch, Esq., makes statement upon behalf of Wilbur Ellis Co., and objects to debtor remaining in possession;

The Court makes statement and denies without prejudice petition of Globe Grain & Milling Co. to intervene;

D. D. Oliphant, Jr., Esq., argues in opposition to continuation of debtor in possession;

M. A. Leonis is sworn and testifies in support of debtor's application to remain in possession, on examination by L. S. Bowden, Esq.,

Various counsel make statements re support or opposition to continuing debtor in possession;

At 3:58 p. m. after a short recess, court reconvenes, and all appearing as before, it is ordered to proceed,

E. T. Meakin is sworn and testifies on examination by the Court, L. S. Bowden, S. L. Lapp, D. D. Oliphant Jr., and Paul Fussell, Esqs., on behalf of claim of Calif. Press Manufacturing Co., and asks that debtor remain in possession;

Jack Hurley, Jr., is sworn and testifies on behalf of claim of Dow-Hurley Marine Works upon examination by the Court, L. S. Bowden, D. D. Oliphant, Jr., L. Kleindienst, and S. L. Lapp, Esqs.,

J. H. Mueller, heretofore sworn in this matter, is called and testifies on examination by L. S. Bowden and D. D. Oliphant, Jr., Esqs., and

At 5:05 p. m. court recesses in this matter until January 27, 1937, at 10:00 a. m.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Wednesday, the 27th day of January, in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

In the Matter of	)	
	)	
American Marine Products Co., a corp.,	)	No. 29145-H Bkcy.
	)	
Debtor	)	

This matter coming on for further hearing on order directed to stockholders to show cause why order continuing debtor in possession should not be made permanent or said order be terminated and Trustee be appointed; David D. Oliphant, Jr., Esq., appearing for Pacific Coast Engineering Co., L. S. Esselstyn, Esq., appearing for Currier S. S. Co., L. Kleindienst, Esq., appearing for Globe Grain & Milling Co., Paul Fussell, Esq., appearing for Battson, Barnes & Lester, Inc., and Nelson Douglas & Co., Leslie S. Bowden, Esq., and Frank Mergenthaler, Esq., appearing for debtor; Stuart L. Lapp, Esq., appearing for Hamons & Co., W. C. Shelton, Esq., appearing for Wilbur Ellis Co., C. W. Hobson, Esq., appearing

for Vegetable Oil Products Co., R. W. Jones being present as official court reporter; Attorney Sutton appearing for Calif. Press Mfg. Co. at 10:08 a. m. counsel answer ready, the Court makes a statement and orders to proceed;

L. S. Bowden, Esq., makes statement re meeting with Board of Directors of Debtor;

D. D. Oliphant, Jr., Esq., Frank Mergenthaler, Esq., L. S. Esselstyn, Esq., Paul Fussell Esq., S. L. Lapp, Esq., Attorney Sutton and L. Kleindienst, Esq., make statements;

At 11:05 a. m. after a twenty minute recess, court reconvenes, and all being present as before,

Various counsel make statements;

L. Kleindienst, Esq., renews motion that Globe Grain & Milling Co. be allowed to intervene, and it is ordered that this matter be placed on Monday calender February 1, 1937 at 10:00 a. m.

It is ordered that Paul Fussell prepare an order appointing a trustee, leaving blank in place for the name of the Trustee and that bond be fixed in the amount of $50,000.00 and that claims may be filed on or before March 15, 1937, and that a blank be left in the order to place the final date upon which a plan of reorganization may be filed.

It is further ordered that debtor may get the S. S. "Currier" ready for the fishing cruise and provision said ship.

[Title of Court and Cause.]

PETITION OF THE GLOBE GRAIN AND MILLING COMPANY AND INDUSTRIAL OIL PRODUCTS CORPORATION TO INTERVENE.

TO THE HONORABLE JUDGES OF THE ABOVE-ENTITLED COURT:

Come now the Globe Grain and Milling Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and Industrial Oil Products Corporation, a corporation organized and existing under and by virtue of the laws of the State of California, and petition this honorable Court for leave to intervene in the above-entitled matter, and for grounds thereof allege:

I

Globe Grain and Milling Company, one of your petitioners, and the debtor herein, during the month of July, 1936, entered into their three contracts of sale whereby the debtor agreed to furnish and deliver to petitioner, Globe Grain and Milling Company, 1240 tons of sardine meal of the quality therein described at the price of $31.00 per ton for 1,000 tons thereof, and $32.00 per ton for 240 tons of said meal, true copies of each of said contracts being attached hereto as Exhibits "A", "B", and "C", respectively, and by reference made a part hereof as though herein fully set out. That no part of said meal has been delivered by debtor to said petitioner.

II

That the market price of said sardine meal of the quality described in said contracts is now the sum of $50.00

per ton. That on or about the 7th day of January, 1937, the debtor notified the petitioner, Globe Grain and Milling Company, that it intended to disaffirm and reject said contracts subject to the approval of this honorable Court, and further notified the petitioner, Globe Grain and Milling Company that debtor did not intend to deliver said meal or any part thereof.

III

That Industrial Oil Products Corporation, one of your petitioners, and the debtor herein, during the month of July, 1936, entered into a contract of sale whereby the debtor agreed to furnish and deliver to petitioner, Industrial Oil Products Corporation, 10 Standard Seller's Tank Cars of Prime Crude Sardine Oil, of the quality therein described, at the price of 30 cents per gallon, to be delivered as therein set out. That a Standard Seller's Tank Car contains 8,000 gallons. That a true copy of said contract is hereunto attached and marked Exhibit "D", and by reference made a part hereof as though herein fully set out. That no part of said oil has been delivered by the debtor.

IV

That the market value of said oil of like quality during the month of December, 1936, and the month of January, 1937, is and has been 50 cents per gallon. That on or about the 25th day of January, 1937, the debtor advised this petitioner that it did not intend to deliver said oil or any part thereof.

V

Petitioners are informed and believe that the debtor entered into said contract and contracts of a similar nature with others wherein it, the debtor, agreed to sell its

products to be thereafter produced and that the gross sales of said like merchandise amounted to the sum of $800,-000.00, and that the debtor has made no effort in good faith to fulfill said contracts of sale to these petitioners and others of a like class, although the debtor did use said contracts of sale for the purpose of advancing the sale of its corporate capital stock to the public.

VI

That said petitioner, Industrial Oil Products Corporation, is informed and believes that there is now in the possession of the debtor about 45,000 gallons of such sardine oil, and the debtor threatens to sell the same to others than this petitioner and under the orders of this Court; that this petitioner, Industrial Oil Products Corporation, claims an equitable right in said oil and a right to be heard in the disposition thereof.

VII

That the petitioner, Globe Grain and Milling Company, is informed and believes that the debtor has now in its possession large quantities of sardine meal of the quality described in Exhibits "A", "B" and "C" hereto attached, and that the debtor has threatened to dispose of said merchandise to others than said petitioner, under orders of this Court, and that sales to others will be detrimental to the interests of said petitioner. That said petitioner, Globe Grain and Milling Company, claims an equitable right in said meal and a right to be heard in the disposition thereof.

VIII

That on or about the 31st day of December, 1936, this honorable Court entered its order approving the reorganization petition of debtor as properly filed under Sec. 77-B

of the Bankruptcy Act, and further ordered that the debtor remain in control of its assets with like powers exercised by a receiver or trustee in bankruptcy as in said act provided.

IX

That the interest of your petitioners is large and petitioners desire that their counsel be fully advised in all proceedings herein taken; that they be represented by counsel at all proceedings herein; that by reason of the debtor's default in fulfilling said contracts and the breach thereof on its part, matters will come before the Court in these proceedings which materially affect the rights of petitioners and all persons to whom the debtor is obligated in a like manner, and that these petitioners would not have proper representations by counsel in such proceedings unless parties thereto.

X

That this petition is made on behalf of the Globe Grain and Milling Company, a corporation, and Industrial Oil Products Corporation, a corporation, and all persons who have unfilled contracts and care to be a party hereto and join herein; that the interest of such persons will not be adequately protected unless they be permitted to intervene and to be at all times represented by counsel.

WHEREFORE, your petitioners pray that they be permitted to intervene in said proceedings.

HIBBARD & KLEINDIENST

By Louis Kleindienst

Attorneys for Petitioners, Globe Grain and Milling Company and Industrial Oil Products Corporation.

STATE OF CALIFORNIA)
) SS.
County of Los Angeles)

J. R. GOODWIN, being by me first duly sworn, deposes and says: That he is the Secretary of Globe Grain and Milling Company, one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to those matters that are therein stated on information and belief, and as to such matters that he believes it to be true. That he makes this verification on behalf of the Globe Grain and Milling Company.

J R Goodwin

Subscribed and sworn to before me this 28th day of January, 1937,

[Seal] Howard W. Todd

Notary Public in and for the County of Los Angeles, State of California

STATE OF CALIFORNIA)
) SS.
County of Los Angeles)

VICTOR J. POLL, being by me first duly sworn, deposes and says: That he is the Treasurer of Industrial Oil Products Corporation, one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to those matters that are therein stated on information and belief, and as to such matters that he believes it to be true. That he makes this verification on behalf of the Industrial Oil Products Corporation.

Victor J Poll

Subscribed and sworn to before me this 28th day of January, 1937,

[Seal] Howard W. Todd

Notary Public in and for said County of Los Angeles, State of California

[Title of Court and Cause.]

PETITION OF MURRAY OIL PRODUCTS COMPANY TO INTERVENE.

TO THE HONORABLE JUDGES OF THE ABOVE-ENTITLED COURT:

Comes now Murray Oil Products Company, and adopts the petition of the Globe Grain and Milling Company and hereby joins in said petition as an intervener, and further alleges:

I

That petitioner is a corporation duly existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business in the City of Philadelphia.

II

That on or about the 14th day of July, 1936, petitioner and the debtor herein entered into a contract of sale whereby the debtor agreed to sell 10 cars of 8000 gallons each of sardine oil of a quality therein described, for the sum of 30 cents per gallon. That said contract is attached hereto, marked Exhibit "E", and made a part hereof as though fully set out herein.

WHEREFORE, this petitioner prays that it be permitted to intervene in said proceedings.

HIBBARD & KLEINDIENST

By Louis Kleindienst

Attorneys for Petitioner, Murray Oil Products Company

STATE OF CALIFORNIA)
) SS.
County of Los Angeles)

VICTOR J. POLL being by me first duly sworn, deposes and says: That he is the Agent of MURRAY OIL PRODUCTS COMPANY, the petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to those matters that are therein stated on information and belief, and as to such matters that he believes it to be true. That he makes this verification on behalf of the MURRAY OIL PRODUCTS COMPANY.

Victor J Poll.

Subscribed and sworn to before me this 28th day of January, 1937,

[Seal] Howard W Todd

Notary Public in and for the County of Los Angeles, State of California

EXHIBIT A

SNOW BROKERAGE COMPANY

Los Angeles, Calif.
July 17, 1936

File Number 14640
Please refer to
This contract as
CONTRACT NO. 14640

SELLER	AMERICAN MARINE PRODUCTS COMPANY 685 Chamber of Commerce Bldg. Los Angeles, California.
BUYER	Globe Grain and Milling Company Ogden, Utah
COMMODITY	Sardine Meal, Guaranteed Minimum 65% Protein, F. A. Q. Color and Grind to be made from whole fish, and packed in 100 lb. net weight sacks.
QUANTITY PRICE	One Hundred Eighty (180) Tons Thirty-two Dollars ($32.00) per ton f. o. b. cars San Francisco, Calif.
TERMS OF PAYMENT:	Sight draft/Bill of Lading
TIME OF SHIPMENT:	November, 1936, to March 1937, inclusive, one car each month, subject to production SSCurrier.

ROUTING	To buyer at Ogden, Utah
BILLING:	Globe Grain and Milling Company, Ogden, Utah
REMARKS	Analysis tags will be furnished by seller
WFB/s	Thank you
	This meal to follow 2,000 tons previously sold to others.

OTHER CONDITIONS – Either party shall not be liable for delays in delivery or acceptance when caused by partial or total interruption of transportation facilities, nor when such delays are caused by inability to secure freight space or tank cars, or by war, embargoes, or other acts of any Government or Governmental authority, strikes, riots, civil commotions, explosions, fires, acts of God, or other causes beyond Buyer's or Seller's control. Any tax or other governmental charge upon the production and/or sale and/or shipment of the material herein specified imposed by the Federal, state or municipal authorities, and any increase in port charges, and hereafter becoming effective within the life of this contract shall be paid by the Buyer.

AMERICAN MARINE PRODUCTS COMPANY – SELLER

ACCEPTED SNOW BROKERAGE COMPANY

By J. Hartje Mueller (Signed)

By William F. Bird (Signed)

GLOBE GRAIN & MILLING COMPANY–BUYER

By O. H. Morgan, Pres. (Signed)

EXHIBIT B

SNOW BROKERAGE COMPANY

Los Angeles, Calif.
July 18, 1936

File No. 14641

Please refer to
this contract as
CONTRACT NO.

SELLER	American Marine Products Company 685 Chamber of Commerce Building Los Angeles, California
BUYER	Globe Grain & Milling Company Ogden, Utah
COMMODITY	Sardine Meal, guaranteed Minimum 65% Protein, F. A. Q., Color & Grind, To be made from Whole fish, and packed in 100 lb. net weight sacks.
QUANTITY	Sixty (60) tons
PRICE	Thirty-two Dollars ($32.00) per ton F. O. B. Cars San Francisco, Calif.
TERMS OF PAYMENT:	Sight Draft/Bill of Lading
TIME OF SHIPMENT:	November, 1936, to March, 1937, inclusive, subject to production, SSCurrier
ROUTING	To buyer at Ogden, Utah
BILLING	Globe Grain and Milling Company, Ogden, Utah

REMARKS: Thank you.

Analysis Tags will be furnished by Seller

This meal to follow 2,680 tons previously sold.

WFB/s

OTHER CONDITIONS: Ether party shall not be liable for delays in delivery or acceptance when caused by partial or total interruption of transportation facilities, nor when such delays are caused by inability to secure freight space or tank cars, or by war, embargoes, or other acts of any Government or Governmental authority, strikes, riots, civil commotions, explosions, fires, acts of God, or accidents, or other causes beyond Buyer's or Seller's control.

Any tax or other governmental charge upon the production and/or sale and/or shipment of the material herein specified imposed by the Federal, State or Municipal authorities, and any increase in port charges, and hereafter becoming effective within the life of this contract shall be paid by the Buyer.

AMERICAN MARINE PRODUCTS COMPANY - SELLER

Accepted:

By J. Hartje Mueller (Signed)

GLOBE GRAIN AND MILLING COMPANY - BUYER

By O. H. Morgan, Pres. (Signed)

SNOW BROKERAGE COMPANY

By William F. Bird (Signed)

As Brokers only

EXHIBIT C

Contract

SNOW BROKERAGE COMPANY

Imports, Brokers, Exports

3039 East Twelfth Street – Telephone ANgelus 5135 –

Mailing Address:
Box 417 Arcade Annex

LOS ANGELES, CALIFORNIA
July 23, 1936

FILE NUMBER 14657
Please refer to
this contract as
CONTRACT NO. 14657

SELLER	American Marine Products Company 685 Chamber of Commerce Building Los Angeles, California
BUYER	Globe Grain and Milling Company 907 East Third Street Los Angeles, California
COMMODITY	Prime Sardine Meal, Guaranteed Minimum 65% Protein, 100 lb. net weight bags.
QUANTITY:	One Thousand (1,000) Tons.
PRICE:	Thirty-one Dollars ($31.00) per ton F. O. B. Pacific Coast Ports, as below.

TERMS
OF PAYMENT: Sight Draft/Bill of Lading

TIME OF
SHIPMENT: 200 tons each November, December, January, 1936-37 F. O. B. San Francisco

200 tons February, 1937, F. O. B. San Francisco or Los Angeles, Seller's option.

200 tons March, 1937, F. O. B. Los Angeles, subject to production, S. S. Currier.

ROUTING: To buyer's order.

BILLING: Globe Grain and Milling Company, Los Angeles.

REMARKS: Tag meal and buyer will pay tonnage tax except when meal ordered for out of State.

WFB/s Thank you.
This meal to follow 2,740 tons previously sold.

OTHER CONDITIONS:– Either party shall not be liable for delays in delivery or acceptance when caused by partial or total interruption of transportation facilities, nor when such delays are caused by inability to secure freight space or tank cars, or by war, embargoes, or other acts of any Government or Governmental authority,

strikes, riots, civil commotions, explosions, fires, acts of God, or accidents, or other causes beyond Buyer's or Seller's control, to include failure of usual sardine run.

Any tax or other governmental charge upon the production and/or sale and/or shipment of the material herein specified imposed by the Federal, State or Municipal authorities, and any increase in port charges, and hereafter becoming effective within the life of this contract shall be paid by the Buyer.

AMERICAN MARINE PRODUCTS COMPANY – SELLER

Accepted: By J. Hartje Mueller (signed)

GLOBE GRAIN AND MILLING COMPANY – BUYER

By O. H. Morgan, Pres. (Signed)

SNOW BROKERAGE COMPANY

By William F. Bird (Signed)
As Brokers only.

EXHIBIT D

CONTRACT

SNOW BROKERAGE COMPANY
IMPORTS - BROKERS - EXPORTS

3039 East Twelfth Street - Telephone ANgeles 5135

Mailing Address Box 417 Arcade Station.

LOS ANGELES, CALIFORNIA
July 14, 1936

FILE NUMBER 14633
Please Refer to this Contract as
CONTRACT NO. 14633

SELLER:	American Marine Products Company, 685 Chamber of Commerce Bldg. Los Angeles, California.
BUYER:	Industrial Oil Products Company, 5641 South Riverside Drive, Los Angeles, California.
COMMODITY:	Prime Crude Sardine Oil, Maximum 2% F.F.A., Basis 1% M.I.U. Maximum 3% Color Light
QUANTITY:	Ten (10) Standard Seller's Tank Cars.
PRICE:	Thirty Cents (30¢) per gallon F.O.B. San Francisco or Wilmington or San Pedro, California, Seller's Option.
TERMS OF PAYMENT:	Sight Draft/Bill of Lading.
TIME OF SHIPMENT:	5 Cars December, 1936, 5 cars January, 1937, with 30 days delay allowed for bad fishing weather subject to production, SS Currier., first five cars produced in each month.

ROUTING:	To buyer at Los Angeles.
BILLING	Industrial Oil Products Company, Los Angeles.
REMARKS:	Curtis & Tompkins or Gooch analysis to govern.
WFB/s	Thank you.

OTHER CONDITIONS:—Either party shall not be liable for delays in delivery or acceptance when caused by partial or total interruption of transportation facilities, nor when such delays are caused by inability to secure freight space or tank cars, or by war, embargoes, or other acts of any Government or Governmental authority, strikes, riots, civil commotions, explosions, fires, acts of God, or accidents, or other causes beyond Buyer's or Seller's control.

Any tax or other governmental charge upon the production and/or sale and/or shipment of the material herein specified imposed by the Federal, State or Municipal authorities, and any increase in port charges, and hereafter becoming effective within the life of the contract shall be paid by the Buyer.

AMERICAN MARINE PRODUCTS
COMPANY—SELLER.

Accepted:

By J. HARTJE MUELLER (Signed)

INDUSTRIAL OIL PRODUCTS
COMPANY—BUYER
By H. MacFAUL

SNOW BROKERAGE COMPANY
By WILLIAM F. BIRD (Signed)
As Brokers only.

EXHIBIT E

R. J. ROESLING & COMPANY

SAN FRANCISCO CHICAGO NEW YORK

Date July 14, 1936. CONTRACT No. 2110

SELLER:	American Marine Products Company, Los Angeles, California.
PURCHASER:	Murray Oil Products Company, Philadelphia, Pennsylvania.
COMMODITY:	Light California Sardine Oil.
QUANTITY:	Ten (10) tank cars of about 8,000 gallons capacity each.
QUALITY:	Maximum 2% FFA. usual allowances Moisture and Impurities Over 1% Maximum 3%.
SHIPMENT:	51st to 60th tank inclusive beginning anticipated production October 1936, subject to production, SS Currier.
PRICE:	Thirty (30¢) Cents per gallon of 7½ pounds, fob. tank cars, San Francisco Bay area or Los Angeles Harbor, at sellers option.
TERMS OF PAYMENT:	Sight draft against bills of lading, weight certificate and certificate of analysis.

REMARKS: Weights: Bureau Transcontinental Freight.

1. Any tax or other governmental charge levied or imposed by Federal, State or Municipal authorities upon the production, sale or shipment of the commodity herein specified or affecting the subject of this contract, shall be added to the contract price herein specified, and shall be paid by the buyer.

2. Pacific Coast sampling and analysis shall be final unless otherwise specifically stated in contract. On all deliveries involving shipment by rail, Transcontinental Freight Bureau weight certificate shall govern.

3. Separate and independent contracts for sale for the several installments agreed to be delivered, are intended, and no breach by the seller as to a particular installment shall affect the contract for any other installment; but, if the buyer shall fail to make any payment as provided, or to fulfill the terms of this, or any other agreement with the seller, the seller may, without prejudice to other lawful remedy, defer further deliveries, or at its option cancel this or any other contracts with the buyer.

4. The sellers are not responsible for non-delivery, or delay of delivery caused by strikes, fire, floods, droughts, accidents, war, insurrection, lockouts, break-down of machinery, perils of the sea, railroad

embargoes or any other contingency on overland railroads beyond the sellers' control or any other unavoidable causes.

5. Any dispute arising under this contract is to be settled by arbitration in San Francisco, California, upon immediate demand on the part of either sellers or buyers, the decision of the arbitration being final and binding on both parties.

MURRAY OIL PRODUCTS COMPANY
By FRED E. LOUD Pres.
BUYERS

AMERICAN MARINE PRODUCTS COMPANY
By J. Hartje Mueller
SELLERS

R. J. ROESLING & COMPANY
As Brokers Only.
per J. ROESLING

[Endorsed]: Filed 10:30 a m Feb 1 - 1937 R. S. Zimmerman, Clerk By L Wayne Thomas Deputy Clerk

At a stated term, to wit: The February Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the first day of February in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

In the Matter of	)	
	)	
American Marine Products Co., a corp.,	)	No. 29145-H Bkcy.
	)	
Debtor.	)	

This matter coming on for hearing on petition of Globe Grain & Milling Co., et al., to intervene; Frank Mergenthaler, Esq., appearing for Currier S. S. Co., and L. Kleindienst, Esq., appearing for Globe Grain & Milling Co., make statements to the Court, whereupon,

It is ordered this matter be continued to February 4, 1937 for submission and that at that time exception to be noted to any injured party as to the decision of the Court, and it is further ordered that parties contact attorneys for trustee and that trustee notify interested parties of and proceedings in this case.

[Title of Court and Cause.]

ANSWER TO PETITIONS OF GLOBE GRAIN AND MILLING COMPANY, INDUSTRIAL OIL PRODUCTS CORPORATION, AND MURRAY OIL COMPANY, TO INTERVENE.

Comes now the Debtor above named, and answering the petitions of Globe Grain and Milling Company, Industrial Oil Products Corporation and Murray Oil Products Company to intervene in this proceeding, alleges as follows:

I.

Denies each and every allegation contained in Paragraph V of the petition of the Globe Grain and Milling Company, Industrial Oil Products Corporation, and Murray Oil Products Company.

II.

Denies each and every allegation contained in Paragraph VII of the petition of the Globe Grain and Milling Company, Industrial Oil Products Corporation, and Murray Oil Products Company.

AND AS A FURTHER, SEPARATE AND DISTINCT DEFENSE TO SAID PETITIONS FOR INTERVENTION, DEBTOR ALLEGES:

I.

That none of the petitioners herein have any equitable interest, or otherwise, in any of Debtor's products now

on hand. That as to the contracts of the Globe Grain and Milling Company, said Globe Grain and Milling Company has no right to purchase from Debtor any products until Debtor has produced and sold two thousand (2,000) tons to other parties.

That Debtor has not produced in excess of five hundred (500) tons of meal since it commenced operations in November, 1936, and that during the present fishing season it is doubtful whether Debtor will produce, in the ordinary course of business, two thousand (2000) or fifteen hundred (1500) tons of meal.

That all of said contracts are made subject to production of the S. S. Currier.

That at the date of the filing of the petition in this proceeding, to-wit: December 31, 1936, none of said petitioners were creditors of this Debtor.

WHEREFORE, Debtor prays that the petitions of Globe Grain and Milling Company, Industrial Oil Products Corporation, and Murray Oil Products Company to intervene in this proceeding be denied.

LESLIE S. BOWDEN
FRANK MERGENTHALER
Attorneys for Debtor

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

A. W. Taylor, being by me first duly sworn, deposes and says: That he is an officer, to-wit: Vice-President of the American Marine Products Company, a California corporation, Debtor in the above entitled matter, and makes this verification for and on behalf of the above named corporation, that he has read the foregoing Answer to Petitions of the Globe Grain and Milling Company, Industrial Oil Products Corporation, and Murray Oil Products Company to Intervene and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

A. W. Taylor

Subscribed and sworn to before me this 2 day of February 1937.

[Notarial Seal] Jess Chenoweth

Notary Public in and for the County of Los Angeles State of California

My Commission Expires June 8, 1939.

[Endorsed]: Filed 10:35 A. M. Feb. 3, 1937 R. S. Zimmerman, Clerk By R. B. Clifton Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Thursday, the 4th day of February in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

In the Matter of	)	
	)	
American Marine Products Co., a corp.,	)	No. 29145-H-Bkcy.
	)	
Debtor.	)	

This mater coming on for submission on petition of Globe Grain & Milling Co., et al., to intervene; Edwin L. Searl, Esq., appearing for the Trustee, makes a statement, whereupon

It is ordered the petition of Globe Grain & Milling Co., et al., for leave to intervene be denied without prejudice to renewing same when conditions shall have changed. Exception noted to petitioners.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	
AMERICAN MARINE PRODUCTS COMPANY,	No. 29145 H
debtor	
~~In Bankruptcy Under Sec. 77-B of the Bankruptcy Act.~~	

PETITION FOR AN ALLOWANCE OF APPEAL AND ORDER OF ALLOWANCE IN CONTROVERSY UNDER SECTION 77-B OF THE BANKRUPTCY ACT.

TO THE HONORABLE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Globe Grain and Milling Company, Industrial Oil Products Corporation and Murray Oil Products Company, appellants and petitioners in the above entitled proceedings considering themselves aggrieved by the Order and Decree made and entered in said cause on the 4th day of February, 1937, hereby appeals from said Order and Decree

and the whole thereof to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons specified in their Assignment of Errors filed herewith, that a transcript of the record, proceedings and papers upon which said Decree and Order was made and entered as aforesaid, duly authenticated, may be sent to said Circuit Court of Appeals sitting at San Francisco. The Decree and Order above referred to and from which these appellants and petitioners desire to appeal, as aforesaid, adjudged and decreed among other things that the appellants and petitioners herein in effect did not come within the purview nor were not interested under Sec. 77-B of the Bankruptcy Act to intervene in the above proceedings.

AND SAID PETITIONERS further pray that this honorable court may enter an order allowing such appeal and fixing the amount of security to be required to perfect their appeal.

HIBBARD & KLEINDIENST

By Louis Kleindienst

Attorneys for Appellants and Petitioners, Globe Grain and Milling Company, Industrial Oil Products Corporation and Murray Oil Products Co.

ORDER ALLOWING APPEAL

The foregoing Petition for Appeal having been presented to the Court and by it duly considered, it is hereby ordered that the said petition be and the same is hereby granted and allowed, and the bond on appeal to be given on behalf of the appellants and petitioners is hereby fixed

[L.S.B. F.M.] debtor

at $250/00 to cover the costs of the ~~bankrupt~~ corporation, American Marine Products Company, in this action, to be conditioned according to law.

March

Dated this 4th day of ~~February,~~ 1937.

H A Hollzer

Judge

Approved as to form, this 15 day of February, 1937.

Leslie S. Bowden

FRANK MERGENTHALER

by Leslie S. Bowden

Attorney for Debtor

[Endorsed]: Received copy of the within Petition this 15th day of February 1937 Leslie S. Bowden & Frank Mergenthaler Attorneys for debtor Filed Mar 4, 1937 1:55 P M R. S. Zimmerman, Clerk By R. B. Clifton Deputy Clerk

[Title of Court and Cause.]

ASSIGNMENT OF ERROR

The Globe Grain and Milling Company, Industrial Oil Products Corporation and Murray Oil Products Company, petitioners to intervene in the above entitled proceedings, file with their petition for appeal herein Assignments of Error as follows:

THE TRIAL COURT ERRED:

1. In effect holding that appellants and petitioners were not sufficiently interested in said proceedings to be allowed to intervene under Sec. 77-B sub sec. (c) of the Bankruptcy Act.

2. In effect holding that appellants and petitioners were not interested in said proceedings to be allowed to intervene under Sec. 77-B sub sec. (c) of the Bankruptcy Act.

3. In effect holding that appellants and petitioners did not come within the purview of Sec. 77-B of the Bankruptcy Act.

HIBBARD & KLEINDIENST

By Louis Kleindienst

Attorneys for Appellants and Petitioners, Globe Grain and Milling Company, Industrial Oil Products Corporation and Murray Oil Products Company.

[Endorsed]: Received copy of the within Assignment of Error this 15th day of February 1937 Leslie S. Bowden & Frank Mergenthaler Attorneys for debtor Filed 1:55 P M Mar. 4, 1937 R. S. Zimmerman, Clerk By R B Clifton Deputy Clerk

[Title of Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, the petitioners and appellants, Globe Grain and Milling Company, a corporation, Industrial Oil Products Corporation, a corporation, and Murray Oil Products Company, a corporation, has appealed, or is about to appeal to the Circuit Court of Appeals for the Ninth Circuit from an order and decree entered against them in said matter in the District Court of the United States, Southern District of California, Central Division, in favor of the debtor in said matter in said action on the 4th day of February of A. D. 1937, denying said petitioners and appellants the right to intervene in said matter.

NOW THEREFORE in consideration of the premises and of such appeal the undersigned Great American Indemnity Company, a corporation, organized and existing under the laws of the State of New York and duly authorized to transact a general business in the State of California, does hereby undertake and promise on the part of the petitioners and appellants that said petitioners and appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding TWO HUNDRED FIFTY ($250.00) DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney in Fact at Los Angeles, California, the 10th day of March, A. D. 1937.

GREAT AMERICAN INDEMNITY COMPANY

Harold W McGee

Attorney in Fact. [Seal]

The premium charged for this bond is $10/00 Dollars per annum.

The within bond is approved both as to sufficiency of surety and as to form this 11 day of March, 1937.

H. A. Hollzer
Judge

Examined and recommended for approval as provided by rule 28.
Louis Kleindienst
Attorney at Law.

State of California)
County of Los Angeles) ss

On this 10th day of March, in the year 1937, before me Esther L. MacDonald, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn personally appeared Harold W McGee, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Great American Indemnity Company, a corporation, and acknowledged to me that he subscribed the name of the Great American Indemnity Company, thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] Esther L. MacDonald
Notary Public in and for said County and State.
My Commission Expires July 13, 1938.

[Endorsed]: Filed R. S. Zimmerman Clerk 10:38 Mar 11 1937 A. M. By R. B. Clifton Deputy Clerk.

[Title of Court and Cause.]

PRAECIPE INDICATING RECORD REQUIRED TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

PLEASE TAKE NOTICE, that the appellants designate the following as portions of the record in this case to be incorporated in the transcript on appeal:

1. Debtor's petition for reorganization, filed December 31, 1936.
2. Order approving debtor's reorganization petition, etc., filed December 31, 1936.
3. Petition of appellants to intervene, filed February 1st, 1937.
4. Answer of debtor to petition of appellants to intervene which was filed February 3, 1937.
5. Petition for allowance of appeal and order of allowance.
6. Minute Order dated *3/4/37*, denying petition of appellants to intervene, with exception allowed.
7. All minute entries in said proceedings.
8. Assignment of Error filed March 4, 1937.
9. Citation filed March 4, 1937.
10. Bond on appeal, approved and filed March 11, 1937.
11. This praecipe.

HIBBARD & KLEINDIENST
By Louis Kleindienst
Attorneys for Appellants

[Endorsed]: Filed R. S. Zimmerman, Clerk 1:25 Mar. 17, 1937 P M. By R B Clifton Deputy Clerk

[TITLE OF COURT AND COURT.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 58 pages, numbered from 1 to 58, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; Debtor's petition for its corporate reorganization; order approving Debtor's reorganization petition authorizing Debtor's continuance in possession, etc.; orders of January 18, 1937, January 25, 1937, January 26, 1937, and January 27, 1937; petition of Globe Grain and Milling Company and Industrial Oil Products Corporation to intervene, and petition of Murray Oil Products Company to intervene; order of February 1, 1937; answer to petitions of Globe Grain and Milling Company, Industrial Oil Products Corporation and Murray Oil Company to intervene; order of February 4, 1937; petition for appeal and order allowing appeal; assignment of errors; undertaking for costs on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellants herein and a receipted bill is herewith enclosed, also that

the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8505.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Debtor.

GLOBE GRAIN AND MILLING COMPANY, INDUSTRIAL OIL PRODUCTS CORPORATION, AND MURRAY OIL PRODUCTS COMPANY,

Appellants,

vs.

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF

HIBBARD AND KLEINDIENST,
409 Kerckhoff Bldg., 121 E. 6th St., Los Angeles,
Attorneys for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

CITATIONS.

No. 8505.

In the United States
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For the Ninth Circuit.

In the Matter of

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Appellants,

vs.

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF

Statement of Pleading and Jurisdictional Facts.

1. The American Marine Products Company, a corporation, debtor, filed its petition for reorganization under Section 77-B of the National Bankruptcy Act.

2. The appellants petitioned the Court for permission to intervene by virtue of the provisions of Section 77-B, subdivision c. paragraph 11 [11 U. S. C. A. § 207, c.

(11)], which reads as follows: "Any creditor * * * shall have the right to be heard on the question of the permanent appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan, and upon filing a petition for leave to intervene, on such other questions arising in the proceedings as the judge shall determine." The said petition to intervene was also submitted to the Court under the practice in equity to litigate all matters and prevent a multiplicity of suits, in the event the appellants were held to be not creditors, and further under Equity Rule Number 38. The petition of the appellants [Record 27] alleges [Record 29] that the debtor has 45,000 gallons of oil and a large quantity of meal, and that appellants have an interest therein, and that the debtor, with the approval of the Court, threatens to dispose of said merchandise to the detriment of the appellants. The questions involved are these: the appellee, debtor, entered into certain contracts to deliver merchandise to the appellants, some of which merchandise was deliverable subject to production [Record 35, 37, 39 and 44] and other merchandise was deliverable not subject to production [Record 42]. The debtor produced some merchandise but repudiated its contracts with appellants and claims the latter have no interest in the merchandise on hand or in that proposed to be produced. The debtor further denies, in answer to appellants' petition, that the appellants are creditors [Record 49].

Statement of the Case.

On December 31, 1936, debtor filed its petition for reorganization under said Section 77-B. On the same day, the Court made its order authorizing the debtor to continue in possession of its business, etc. [Record 14]. Other litigants were permitted to intervene on January 18, 1937 [Record 19]. On February 1, 1937, appellants herein filed their petitions to intervene [Record 21]. On February 4th, thereafter, the Court took the matter under subsmission upon the petitions, and denied the appellants the right to intervene and allowed an exception [Record 23].

Assignment of Error.

All assignments of error enumerated on page 55 of the Record will be consolidated for the purpose of argument, because, though severally stated, they constitute a single error.

The Trial Court Erred:

1. In effect holding that appellants and petitioners were not sufficiently interested in said proceedings to be allowed to intervene under Section 77-B, subdivision (c) of the Bankruptcy Act.

2. In effect holding that the appellants and petitioners were not interested in said proceedings to be allowed to intervene under Section 77-B, subdivision (c) of the Bankruptcy Act.

3. In effect holding that appellants and petitioners did not come within the purview of Section 77-B of the Bankruptcy Act.

The controversies which the court below should determine are:

(a) Whether or not the appellants, or any of them, have any interest in the oil or meal now on hand;

(b) Whether appellants, or any of them, will have any right or interest in any further products of the debtor; and

(c) Whether the appellants, or any of them, are creditors of appellee, the debtor.

Such questions present controversial matters which are proper subjects for intervention.

ARGUMENT.

Appellants herein claim rights which are not entirely litigable under that portion of Section 77-B, subdivision c (11) relating to powers of creditors who are not before the Court on petition in intervention. The controversy herein existing is remote to the matter of the permanent appointment of a trustee, and under this section. any other subject of controversy, with the exception of "the proposed confirmation of any reorganization plan," may be presented, heard and determined only after intervening in the proceedings. The ruling appealed from leaves these appellants without an opportunity to have

their respective rights determined. In the present state of the proceedings before the trial court, the debtor, with the approval of the Court, may, on *ex parte* order, sell merchandise in which appellants claim an interest. It will plainly be seen from Exhibit "D" [Record 42], that the debtor agreed to deliver oil, subject to production, and appellants allege that there was, at the time the petition was filed, 45,000 gallons of such oil [Record 29] in the possession of the debtor. This allegation was not denied by the debtor in his answer [Record 48-9], the result of which is to leave a subject matter and controversy to which the Court below should give just consideration at the time debtor attempts to make disposition of its products aforementioned. It will therefore be impossible for the appellants to present their respective contentions without notice of the filing of petitions by debtor and proposed issuance of orders respecting their rights. Should such orders for such disposition of said merchandise be made adverse to appellants, they could not take appeal on any such questions decided unless they had filed their petition for intervention. Under the section above-mentioned, they could not even be heard "on such other questions in the proceedings as the judge shall determine."

Harkins v. Milwaukee & Sawyer Bldg. Corporation, 79 Fed. (2d) 478 (1935),

which decision contains language as follows: "Petitioner filed no intervening petition in the proceeding below, hence, was a party to them only for the purposes enumerated in the statute. It follows that she was not entitled

to pray an appeal to this Court nor to other relief sought in her petition."

It will plainly be seen that no opportunity will be afforded appellants to be heard on the questions they present, unless they first come into Court in the manner provided by statute.

Appellants have been denied their day in court, as the lower court has closed all avenues by which appellants could obtain redress for the wrongs they assert have been or may be done. The lower court closed to the appellants any tribunals by enjoining and restraining appellants from instituting or prosecuting any action at law or proceeding in equity against the debtor in any court of law or equity or bankrutpcy, or at all [Record 17].

It is therefore most earnestly urged by counsel for appellants, that in the light of the authorities quoted and cited, and the manifest error of the lower court, this Court should reverse the order heretofore made in the premises by the lower court, and give the appellants the benefit of a hearing upon the real merits of their respective issues.

Respectfully submitted,

HIBBARD AND KLEINDIENST,

By: LOUIS KLEINDEINST,

Attorneys for Appellants.

No. 8505

In the United States Circuit Court of Appeals

For the Ninth Circuit.

16

IN THE MATTER OF

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Debtor,

GLOBE GRAIN AND MILLING COMPANY, INDUSTRIAL OIL PRODUCTS CORPORATION, AND MURRAY OIL PRODUCTS COMPANY,

Appellants,

vs.

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX.

AUTHORITIES.

No. 8505

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Appellants,

vs.

AMERICAN MARINE PRODUCTS COMPANY, a corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

ARGUMENT.

I.

The Appellants Are Not Entitled to Intervene Under the Provisions of Section 77B of the Bankruptcy Act.

The appellants seek to intervene in a proceeding instituted by the appellee under the provisions of Section 77B of the Bankrupcy Act. At the time of filing its

petition, the appellee was engaged in the business of manufacturing fish oil and fish meal. It had entered into executory contracts with divers persons for the sale of its products. (R. p. 6) The appellants were among those with whom such executory contracts had been made. (R. pp. 27, 28 and 33) Copies of the contracts made with the appellants will be found at R. pp. 35, 37, 39, 42 and 44. It is not clear upon what authority the appellants base their contention that they have a right to intervene in the proceeding. They held executory contracts for the purchase of products of the debtor. There is no allegation, nor is there any contention, that they were creditors or stockholders of the Company. The provision of Section 77B relative to intervention is found in Subdivision (c) (11) of that Section (48 Stat. 917, 11 U. S. C. A. Sec. 207 (c) (11)), the pertinent part of which reads as follows:

> "* * * Any creditor or stockholder shall have the right to be heard on the question of the permanent appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan, and upon the filing of a petition for leave to intervene, on such other questions arising in the proceeding as the judge shall determine. * * *"

It is submitted that the appellants are neither creditors nor stockholders and do not come within the classes entitled to intervene in the proceeding. *Gerdes on Corporate Reorganizations* speaking of intervention says at Sec. 792:

> "The language of subdivision (c) (11) of Section 77B seems to indicate that it is intended that

permission to intervene generally should rarely be granted. The statute states that stockholders and creditors shall have the right to be heard 'on such other questions arising in the proceeding as the judge shall determine'. Express mention of general intervention is not made. The judge may, in his discretion, decide that certain creditors or stockholders should be heard on all questions arising in the proceedings and may grant them leave to intervene generally, but he should be chary about giving such permission."

II.

Whether Intervention Is to Be Permitted, Even in the Case of Creditors and Stockholders, Is Within the Discretion of the Judge.

Gerdes on Corporate Reorganizations says, Sec. 791:

"* * * creditors and stockholders of a debtor corporation are given the right under Section 77B to file petitions for leave to intervene in the proceedings to protect their interests. Whether such leave should be granted, and to what extent it should be granted, is left to the discretion of the judge."

In *General Theatres Equipment* 12 F. Supp. 785 (Del. 1935) the Court said:

"Leave to intervene is wholly discretionary with the Court."

The appellants have not pointed out that there was any abuse of discretion on the part of the Court in refusing to permit intervention by the appellants. The ap-

pellee contends that the order of intervention was properly refused. The orderly administration of the proceedings would be obstructed if every person so minded were permitted to intervene. *Gerdes on Corporate Reorganizations* comments as follows: (Sec. 793):

> "General intervention involves the adding of a new party to the proceedings with an independent attorney. If one creditor is permitted to intervene, there is no reason why others similarly situated should not be accorded the same privilege. The orderly conduct of the proceedings is obstructed by the addition of a large number of parties to whom it is necessary to give formal notice of each step in the proceedings, and the expenses of administration are unnecessarily increased when allowances are made to attorneys for many separate creditors."

The petition of the appellants Globe Grain and Milling Company and Industrial Oil Products Corporation presents exactly the objections to intervene above mentioned. In paragraphs IX and X of the Petition to Intervene (R. p. 30) the appellants state that it is their desire that "their counsel be fully advised in all proceedings herein; that they be represented by counsel at all proceedings herein", and that "the petition is filed not only on behalf of the appellants but all other persons having unfilled contracts who may care to join in." Thus the appellants seek a general intervention, which if permitted would saddle a very heavy and onerous burden upon all parties to the proceeding, in that they would be

obliged to give notice to appellants of every step taken regardless of the fact that such step might in no manner affect any interest of the appellants.

The appellee contends that a proceeding under Section 77B "is not like an omnibus into which anyone may get as it goes along."

It is respectfully submitted that the refusal of the Lower Court to permit the appellants to intervene was proper because (1) the appellants failed to establish facts entitling them to intervene and (2) the refusal was within the discretion of the Court, and there is no showing that there was an abuse of discretion.

Leslie S. Bowden and
Frank Mergenthaler
Attorneys for Debtor and Appellee.